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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 933-5106

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472
(919) 642-7151

Counsel for Petitioner

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Southeastern Community College, the petitioner, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 28, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 574 F.2d 1158, and is reprinted in Appendix A hereto, p. 2a, *infra.*

The opinion of the United States District Court for the Eastern District of North Carolina, in the form of findings of fact and conclusions of law, is reported at 424 F.Supp. 1341, and is reprinted in Appendix B hereto, p. 12a, *infra.*

JURISDICTION

Frances B. Davis, the respondent, brought this civil action under the Rehabilitation Act of 1973, 29 U.S.C. §794, and under the Civil Rights Act of 1871, 42 U.S.C. §1983, complaining that the petitioner College had unlawfully denied her admittance to its nursing program because of her admitted hearing disability. On December 22, 1976, the District Court entered a final judgment dismissing the action for lack of constitutional and statutory merit. See Appendix B, p. 12a, *infra.*

On the respondent's appeal, the Fourth Circuit on March 28, 1978, affirmed the District Court's judgment in part, vacated the judgment in part, and remanded the case to the District Court for further proceedings. See Appendix A hereto, p. 2a, *infra.* On June 29, 1978, the Fourth Circuit denied both a petition for rehearing and a suggestion for rehearing en banc, although there were dissents from both denials. See Appendix A hereto, p. 1a, *infra.* On September 18, 1978, Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including October 27, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that no "otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in . . . any program or activity receiving Federal financial assistance." The questions here presented are:

1. Whether Section 504 of this Act precludes a public college from basing a denial of admission to the college's Associate Degree Nursing Program solely upon an admittedly severe hearing handicap of the applicant, where it was shown that the handicap could interfere with the applicant's ability to provide safe patient care both as a student nurse and as a potential Registered Nurse.

2. Whether Section 504 of this Act impliedly imposes upon colleges and universities an affirmative obligation to provide preferential but modified educational opportunities for the seriously handicapped who seek admission to highly skilled professional programs.

3. Whether Section 504 of this Act impliedly gives rise to a private right of action in a federal court by a handicapped individual who has been denied admission to a college's nursing program because of the physical handicap.

4. Whether, if such a private right of action is implied, the handicapped applicant must first pursue and exhaust available H.E.W. administrative remedies respecting individual complaints of discrimination.

STATUTES AND RULES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§84.3 *Definitions.*

As used in this part, the term:

* * * * * * * * * * * * * * *

(k) "Qualified handicapped person" means:

* * * * * * * * * * * * * * *

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

Definitions – 5. *"Qualified handicapped person."* paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the

word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

STATEMENT OF THE CASE

Respondent Davis brought this civil action in the District Court for the Eastern District of North Carolina against the petitioner Southeastern Community College, a public educational institution located at Whiteville, N.C. The District Court found that it had subject matter jurisdiction under 28 U.S.C. §1343(3) to consider two federal statutory claims asserted by Davis:

(A) A claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, alleging that the College had unlawfully discriminated against Davis by denying her admission to its Associate Degree Nursing Program by reason of an obvious and admitted hearing disability; and

(B) A claim under the Civil Rights Act of 1871, 42 U.S.C. §1983, alleging that the College, by denying her admission on that basis, had also denied Davis the right to due process and equal protection of the laws. This §1983 claim, however, is not presently in issue, the Fourth Circuit having rested its decision solely on considerations stemming from Section 504 of the Rehabilitation Act. See footnote 4 of the opinion below, p. 5a, *infra.*

The relevant factual predicates of the Section 504 issues are found in the twelve Findings of Fact rendered by the District Court after a full evidentiary hearing. See Appendix B hereto, pp. 13a-17a, *infra*. For the most part, those findings are uncontested, and reflect the following facts of record:

(1) The central fact in this case is that Davis, according to an independent audiologist associated with Duke University Medical Center, has long had "a severe impairment of her ability to hear, which was detected early in the admission process," and "has a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear . . . [and] a speech discrimination loss which results in remarkable difficulty in understanding speech because of the distortion in her hearing." Finding 7.[1] However, by using a hearing aid and reading lips, "she is skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others." Finding 7. While Davis was found to be aware of gross sounds in the listening environment and to reach the outer limits of normal hearing levels with the use of hearing aids, the audiologist concluded that Davis "can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker." Pl. Ex. 8.

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[1] According to the audiologist's report (Pl. Ex. 6), Davis reported that she had had this hearing loss for many years, that her father and two sisters have significant hearing losses, and that she had worked in a dry cleaning plant for three years. She was born in 1932. Pl. Ex. 4.

It is unquestioned that Davis is a "handicapped person" within the statutory sense. 29 U.S.C. §706(6), quoted by the District Court at p. 19a, *infra*.

(2) In 1967, Davis was duly qualified by the North Carolina authorities as a Licensed Practical Nurse. While there was no evidence that she was continuously employed in that position, the license is currently in good standing. But the testimony at trial indicated that a Licensed Practical Nurse, unlike a Licensed Registered Nurse, "operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." Finding 5.

(3) Davis was enrolled at the petitioner College during the 1973-74 academic year in the undergraduate College Parallel program, designed as preparatory for entrance into the College's Associate Degree Nursing Program. The latter program was structured to train persons to become eligible for testing and licensing, by North Carolina authorities, as Registered Nurses. Findings 2, 4.

(4) Davis successfully completed her courses in the College Parallel program, and thereupon sought admission to the Associate Degree Nursing Program. The College had established criteria for admission to that program, including not only scholastic criteria but an evaluation of the physical condition of the applicant.[2] At the time of Davis' application in 1974, there were in excess of 100 applicants for admission and only 45 available positions to be filled for the quarter in which Davis applied. Finding 6.

(5) In implementing the College's admission criteria, Davis was interviewed by professional members of the Col-

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[2] The College's admission criteria, made available to all prospective applicants for the Associate Degree Nursing Program, required that the following item be included in each student's application folder: "Medical record – serious consideration given to existing health problems." Pl. Ex. 3. See also Finding 12.

lege's nursing program staff to determine her suitability for admission to the program. Because of her obvious hearing impairment, Davis was referred to an independent audiologist at Duke University Medical Center for an evaluation of her hearing disability. The findings and conclusions of the audiologist have been summarized in Paragraph (1) above; see also Pl. Exs. 6, 8, and Finding 7.

(6) In the course of its review of Davis' suitability for the nursing program, the College submitted the audiologist's reports to the Executive Director of the North Carolina Board of Nursing and requested her advice as to Davis' acceptability as a potential Registered Nurse. The Executive Director responded (Pl. Ex. 11) that

> ". . . Mrs. Davis's hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, . . . we would question the advisability of you and the faculty's assuming responsibility for Mrs. Davis's involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with Mrs. Davis's hearing limitations could in fact, be the same as denying her full learning to meet the objectives of your nursing programs.
>
> "The basis for our opinions is found in the audiologist's response to you from Duke University on April 25, and the relationship of this response to expectations of nurses in patient care. . . . Both you and I can identify innumerable patient care situations in which this lady's abilities as defined in the [audiologist's response] would be inadequate for her probably to identify all of the patient's needs for which

> she would be accountable or even to pick up some clues to situations that could be quite critical to the point of life, death, situations.
>
> ". . . We would urge the college in counselling Mrs. Davis to alter her career goal, as we do not believe, on the basis of facts we have now, that Mrs. Davis would either be safe for herself, or for patients, or for faculty to pursue a nursing education program."

The Executive Director supplemented these opinions in responding further to the College's inquiry whether Davis' hearing difficulties would prevent her from being licensed as a Registered Nurse by the state Board of Nursing (Pl. Ex. 14). While the Executive Director could not presently predict eligibility several years hence for taking the licensing examination, she did state that

> ". . . one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse. . . includes evidence that an applicant has no limitations, physically, emotionally, or mentally, to prevent the applicant from practicing nursing, after licensure, without restriction of any kind on the license. From the facts presented . . . and the audiologist's report of Mrs. Davis's hearing capacity it is our opinion that Mrs. Davis has hearing limitations which could interfere with her safely caring for patients. This very situation, also in our opinion, could be highly frustrating to Mrs. Davis. . . .
>
> "We reiterate that each applicant for the licensing examination must provide evidence that

he/she is able, if licensed, to practice nursing as legally defined without any restriction."

(7) In addition to noting these opinions of the Executive Director, the District Court further found that the testimony at the hearing showed "that in many situations such as an operation room, intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible" and that "in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." Finding 8.

(8) The District Court found that the College had denied Davis' application for admission upon the basis of these medical tests respecting her hearing defect. The College admissions authorities, in other words, concluded that Davis had a physical "inability and incapacity to serve in the Associate Degree Nursing Program" and felt that "she would be unable to serve as a Registered Nurse on completion of such program." Finding 9.

(9) Following the denial of Davis' application for admission in May of 1974, Davis visited the Office of the President of the College in June and asked that her application be reviewed again and reconsidered. This reconsideration request was granted, and a committee of staff nurses at the College reviewed all the available material, tests and records. This committee again voted to deny Davis' application. Davis made no further attempts to gain review through college procedures, although the record indicates that the College had a procedure for resolving intramural grievances that Davis could have invoked. But the District Court found that in these circumstances "all parties concerned

knew that the institution of any such [grievance] procedures would be, in essence, futile." Finding 10.

(10) At the evidentiary trial, Davis offered no testimony. She rested her case on the various letters, tests and other exhibits, referred to in the foregoing paragraphs, that had been offered into evidence by stipulation. The College, on the other hand, offered the testimony of various members of its nursing admissions staff, as well as the President of the College, all of whom testified to the effect that Davis "was not qualified or suitable for the Associate Degree Nursing Program by reason of her hearing disability." Finding 11. But Davis did elicit an admission, on cross-examination of the College's witnesses, that with special training and individual supervision she could perform adequately in some selected fields of training. See p. 20a, *infra*.

After noting that "the single major factor" in the denial was "her projected inability to be licensed as a Registered Nurse after graduation," the District Court concluded that such a denial was neither arbitrary nor capricious. See p. 18a, *infra*. And the District Court further concluded, on the implicit assumption that a private right of action lies under Section 504, that the College had not violated the Act. Section 504 was construed to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity. See p. 20a, *infra*.

On appeal, the Fourth Circuit panel held unanimously that the District Court had erred in its reading of Section 504, particularly in light of certain H.E.W. regulations that post-dated the District Court determination. Davis' hearing

handicap, said the panel, could not be considered by the College in determining whether she was "otherwise qualified" – within the meaning of Section 504 – for admittance to the nursing program. Hence the panel vacated and remanded the Section 504 portion of the District Court judgment so that the latter court could focus upon Davis' academic and technical qualifications for admission. And on that remand, the District Court was directed to give "close attention" to Davis' request for some form of "affirmative relief" by way of modifying the nursing program so as to accommodate Davis and her hearing disability. See pp. 8a-10a, *infra*.

The Fourth Circuit panel also affirmed the implicit ruling of the District Court that a private right of action is available under Section 504. But the panel suggested that on the remand the District Court might want to consider the doctrines of administrative exhaustion and primary jurisdiction, matters which had been raised on rehearing but not resolved by the Fourth Circuit.

Chief Judge Haynsworth, one of the members of the panel that heard the appeal, dissented from the denial of the College's petition for rehearing. And Judges Russell and Widener dissented from the denial of rehearing en banc, stating that "they would affirm the judgment of the district court." See p. 1a, *infra*.

REASONS FOR GRANTING THE WRIT

1. *The decision below has a significant impact on the national policy of eliminating discrimination against handicapped individuals.*

This is the first case to reach this Court involving the meaning and scope of Section 504 of the Rehabilitation Act of 1973, which imposes a negative duty on all public and

private sector programs using federal financial aid not to discriminate against the handicapped. The significance of a proper initial interpretation and application of Section 504 by the federal judiciary cannot be overemphasized. The resolution of the statutory problem presented in this case, even though arising for the first time, can well affect the course of future litigation and, more importantly, can affect the career opportunities of countless seriously handicapped persons. In addition, the judicial solution of this initial statutory problem can have a lasting impact on the structuring and financing of the many federally-aided programs in which the handicapped may participate.

Approximately 11,000,000 Americans between the ages of 16 and 64, or one out of every eleven, have been identified as members of the so-called handicapped minority.[3] Half of these handicapped Americans are presently unemployed and their training and integration into an already underemployed work force raises difficult problems. Fundamental changes are being wrought by statute, regulation and practice, as well as by public mores, in response to the growing recognition that one should not suffer discrimination or denial of employment or career opportunities solely because of one's physical handicap. Section 504 is one of the important Congressional responses of this category.

At the same time, the nature of some physical handicaps may make it unwise and unsafe to permit a handicapped person equal access to certain programs, activities or professions. And it passeth belief that Congress intended to compel institutions of higher learning to admit those who are totally or substantially unqualified in the physical sense,

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[3] President's Commission on Employment of the Handicapped, One in Eleven – Handicapped Adults in America: A Survey Based On 1970 U.S. Census Data 2 (1977).

whatever their academic qualifications. A one-armed student simply cannot perform many of the physical skills required of one being trained to become a surgeon; and to license him to perform surgery, even if he were allowed to attend and complete medical school, would endanger the patients and make a mockery of the program. The instant case illustrates just that kind of problem. The District Court found that respondent's hearing disability rendered her "unable to function properly" in various nursing situations she would confront both as a student nurse and a Registered Nurse, and posed "potential danger to future patients in such situations." See p. 20a, *infra*. Any viable anti-discrimination policy, including that embodied in Section 504, must certainly take into account the career limitations imposed by such a handicap. And it must weigh the policy of non-discrimination against the dangers to public and individual safety that may adhere if the physical disabilities are totally to be ignored in all situations. This consideration augments the appropriateness of review of the decision below.

Moreover, the anti-discrimination policy articulated in Section 504 has significant financial repercussions on the agencies and institutions that provide the activities available to the handicapped. The recipients of federal financial aid, including colleges and universities, normally assume certain burdens and responsibilities in providing additional facilities and assistance for the handicapped. But such burdens, particularly without additional federal financial assistance, can become intolerable and counter-productive if they must be incurred to provide extraordinary facilities and safety measures to accommodate those who, however high may be their academic qualifications, are physically incapable of properly performing the physical requirements of the program in question.[4] Such would indeed be the unfortunate result if the "affirmative relief" suggested by the Fourth Circuit were to be implemented in this case. See pp. 8a-10a, *infra*.

[4] This consideration is among those that impelled various States to file an *amici* brief in support of the petitioner both in the Fourth Circuit and before this Court.

The Fourth Circuit has rendered a decision that brings these various factors into sharp focus. In effect, it has interpreted Section 504 in such a way that no kind of physical handicap can be considered a disqualification for admission to any federally-financed program designed to train one for a profession or trade necessitating a total and effective use of human physical skills. It is enough, says the Fourth Circuit, if the severely handicapped individual has the academic and technical qualifications for admission; the institution must then take whatever affirmative steps are necessary including program modifications, to train the blind person to drive or the deaf nurse to perform as a Registered Nurse. That decision, if left unreviewed, can have a devastating and lasting impact upon the federal anti-discrimination policy, to say nothing of the astronomical costs, risks and potential dangers to health and safety that could ensue from training a nurse or doctor who is physically unable to cope with certain medical situations.

2. *The decision below raises an important problem in interpreting the "otherwise qualified handicapped individual" language of Section 504.*

Section 504 states that no "otherwise qualified handicapped individual" shall be excluded from participation in any federally-aided program or activity "solely by reason of his handicap." But nothing in the terse language of Section 504 identifies precisely what is meant by the "otherwise qualified" reference.

The District Court sought to give these words their common or dictionary meaning, and concluded that "these words qualify the passage to mean that no person may be excluded from a federally assisted program or activity sole-

ly by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." See p. 20a, *infra*. Under the District Court's reading, Section 504 would make it impermissible "to exclude a blind or deaf person from admission to a law school, if academically qualified," but entirely permissible "to exclude a person without sight from a position as a truck driver or to refuse a person who must read lips to a position as a telephone operator." *Ibid.* In short, the court interpreted "otherwise qualified" to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." *Ibid.*

Contrariwise, the Fourth Circuit interpreted "otherwise qualified" to mean that the handicapped applicant is otherwise qualified under academic and technical requirements. In so interpreting the words, the Fourth Circuit made no independent analysis of the common meaning of the words or the statutory context in which they appear; nor did it consider what results might follow from its reading. Its treatment of the problem began and ended with a quotation from an H.E.W. regulation (45 C.F.R. § 84.3 (k)), issued subsequent to the District Court's decision, that defines not an "otherwise qualified handicapped person" but simply a "qualified handicapped person." Under that H.E.W. definition, a "qualified handicapped person" means

> ". . . a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's [postsecondary or vocational] education program or activity."[5]

[5] The Fourth Circuit also made reference to the H.E.W.'s official explanation of this definition contained in §84.3(k) (3). According to that explanation (42 Fed. Reg. at 22687):

(continued)

The Fourth Circuit's reading of Section 504 would appear highly suspect and, indeed, impermissible. Certainly Congress could not have intended to mandate the admission of academically and technically qualified handicapped persons whose handicaps are such as to preclude satisfactory, full and safe participation in the training program. Certainly the Fourth Circuit did not seek to support its interpretation of Section 504 by reference or citation to any bit of legislative history. The fact is that there is no such legislative support, and the result reached by the deeply divided Fourth Circuit can only be ascribed to an overly-literal reading of English words.

Perhaps the most severe critique of the Fourth Circuit's result comes from the H.E.W., whose regulations the court deemed decisive of the issue. In its official analysis of §84.3(k) (3), the very regulation relied upon by the Fourth Circuit, the H.E.W. has explained that it deliberately omitted the word "otherwise" in the phrase defined by §84.3(k) (3) precisely because, as has happened in this case, it might lead to a literal reading of the statutory reference to "otherwise qualified handicapped individual" and to a result "clearly . . . not intended by Congress." H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376. According to this analysis, which was available to but not utilized by the Fourth Circuit,

> ". . . the omission of the word 'otherwise' [from the §84.3(k) (3) definition] is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for

[5] (Continued)

> ". . . both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all nonacademic admissions criteria that are essential to participation in the program in question."

> their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly such a result was not intended by Congress."

In sum, the Fourth Circuit's reading of the "otherwise qualified" language has been repudiated by the governmental agency charged with administering Section 504. The court simply did not read far enough into the clarifying H.E.W. regulations and analyses thereof. More significantly, the court's interpretation of the Section 504 language appears to produce a result at odds with the intent of Congress, with the plain meaning of words when read in context, and with common sense. The result of mandating the admittance of handicapped individuals into programs for which they are not physically qualified is far too serious, viewed solely in terms of the safety of those whose very lives may depend upon the availability of able-bodied treatment and assistance, to escape consideration and review of the problem by this Court.

The fact that the Fourth Circuit remanded the case to the District Court to consider the academic and technical qualifications of the respondent does not affect the need or appropriateness for this Court's plenary review at this juncture. In every sense, the Fourth Circuit has rendered a "final" interpretation of the Section 504 language. And by remanding the case for consideration of some form of affirmative action or modification of program in order to train a seriously handicapped person in a profession for which she is physically unsuited, the Fourth Circuit has exacerbated the finality of its misreading of the Section 504 provisions.

The decision below will stand as a dangerous precedent, unless reviewed by this Court, that all institutions must disregard the effect that physical disabilities may have upon

one's capacity to meet the physical demands of a program or of a profession. The time for review of that precedent is now.

3. *The decision below poses a critical problem as to the degree of affirmative action that colleges and universities must take with respect to seriously handicapped persons.*

In remanding the instant case to the District Court, the Fourth Circuit directed that "close attention" be paid to respondent Davis' claim, based on certain H.E.W. implementing regulations, that the petitioner College could be "required to modify the nursing program so as to accommodate the plaintiff and her hearing disability." See p. 8a, *infra*. Such potential affirmative action or relief was deemed supportable "even when such modifications become expensive." See p. 9a, *infra*.

Viewed particularly in the context of a seriously handicapped person seeking admission to a professional program requiring a high degree of physical skills, this affirmative action call by the Fourth Circuit becomes of transcendent importance to all colleges and universities throughout the land. It is one thing to require accommodation to the seriously handicapped who seek to pursue general arts and sciences programs or the more intellectual-type graduate programs, such as the study of law or accounting. It is quite another thing to require modification of certain other programs, such as nursing or medicine, to accommodate those who are incapable of performing all the physical skills required of the student and the ultimate professional.

The basic premise of the Fourth Circuit's affirmative action suggestion is faulty, for it assumes that Section 504 requires the admission of the seriously handicapped to those programs that demand full physical ability and dexterity.

Not even the H.E.W. has suggested that a blind person must be taught how to drive a bus, no matter how "otherwise qualified" he may be. But the Fourth Circuit has ruled otherwise. And if its faulty premise is accepted, then only two courses of affirmative action are open to those colleges and universities that seek to train highly skilled professionals:

(1) Action might be taken to try the hazardous if not the impossible, to train the blind person to drive a bus. To do so, of course, would be at a prohibitive cost to the nation's higher education system, a factor which the Fourth Circuit has already stated is irrelevant.[6] And there would be a concurrent risk to public safety and health, as well as to the well-being of the seriously handicapped person himself.

(2) Alternatively, as the Fourth Circuit seemed to suggest in footnote 6 of its opinion, p. 6a, *infra*, modifications might be made in the skilled professional programs so as to train the seriously handicapped on a preferential basis but only within the limits of the handicap. The blind or deaf person would then be trained to do only what a blind or deaf physician or nurse could do. Such professions would then tend to become stratified, with various classes of doctors or nurses capable of performing only those tasks consistent with their physical capabilities. A true revolution in these professions would then have occurred.

Neither the language nor the legislative history of Section 504 would appear to require or justify either alternative.

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[6] It has been estimated that the annual pecuniary cost to recipients of federal aid of complying with Section 504 will be about 3.2 billion dollars. O'Neill, Discrimination Against Handicapped Persons—The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance (May 4, 1977) (unpublished report prepared for the HEW office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77), p. 65.

But if such is to be the result of the affirmative action required by the Fourth Circuit, review by this Court is an utter necessity. The resulting imposition on the federal courts of the duty of framing and perhaps supervising such affirmative action programs is still another factor justifying the most serious consideration by this Court.

4. *The decision below raises important problems as to whether and when a private right of action may be implied from the broad language of Section 504.*

The Fourth Circuit determined that the District Court's implicit finding that respondent Davis could pursue a private right of action under Section 504 was "legally sound," citing what it called the "sound reasoning" of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977). Certain other Circuits have similarly cited the *Lloyd* ruling as indicative of the "probable" existence of such an action. *Kampmeier v. Nyquist*, 533 F.2d 296, 299 (2nd Cir. 1977) (stating that the *Lloyd* reasoning is "fairly persuasive here" so that it is "probable" that the *Kampmeier* plaintiffs had standing to bring such action); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Leary v. Crapsey*, 566 F.2d 863, 865 (2nd Cir. 1977). Some federal district courts have also cited the *Lloyd* decision in concluding that a private right of action can be implied from Section 504.[7]

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[7] See *Bartels v. Biernat*, 427 F. Supp. 226, 229-230 (E.D. Wis. 1977); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809, 916 (E.D. Pa. 1977); *Duran v. City of Tampa*, 430 F. Supp. 75, 77 (M.D. Fla. 1977); *Barnes v. Converse College*, 436 F. Supp. 635, 638 (D. S.Car. 1977); *Halderman v. Pennhurst State School*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977); *Camenisch v. University of Texas*, No. A-78-CA-961 (W.D. Tex., May 17, 1978).

Other district courts have stressed the peculiar facts and timing involved in *Lloyd* and have recognized that a private right of action is "probably" available only under certain circumstances.[8]

But the foundations of the "sound reasoning" of *Lloyd* have been described as tenuous at best and in need of reconsideration.[9] Moreover, there are hard problems raised by the decision below in the instant case that simply were not addressed or answered in *Lloyd*. It would be unfortunate, therefore, if the *Lloyd* rationale were to be allowed to pick up speed as the leading authority for the proposition that Section 504 gives an implied right of action to any and all handicapped applicants who are denied admission to a federally-financed program. The problems that need the definitive answers that only this Court can give may be summarized as follows:

(1) Much of the *Lloyd* rationale is dubious, outdated and in dire need of reconsideration. Thus, after noting that Section 504 tracks Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, the *Lloyd* court asserted that *Lau*

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[8] See *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1055 (M.D.N.C. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 203-204 (N.D. Tex. 1977); *Doe v. New York University*, 442 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977); *Sherer v. Maier*, No. 77-0594-CV-W-4 (W.D. Mo., Nov. 2, 1977).

See also the divided district court authorities cited in Wright, Equal Treatment of the Handicapped by Federal Contractors, 26 Emory L.J. 65, 98, note 108 (1977); Guy, The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues, 7 Baltimore L. Rev. 183, 204, note 70 (1978).

[9] Brooks, Section 504 of the Rehabilitation Act of 1973 and the Private College: *Barnes v. Converse*, 29 Mercer L. Rev. 745, 751-756 (1978).

v. Nichols, 414 U.S. 563 (1974), held that Section 601 provided a private cause of action – ergo Section 504 provides a cause of action for the handicapped applicant. The difficulty here is that *Lau* made no attempt to discuss or resolve the private right of action issue; the Court simply declared a particular educational practice violative of Section 601.[10]

Indeed, the Seventh Circuit itself has repudiated this notion that *Lau* is controlling as to the existence of a private right of action as to a similar analog, Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. In *Cannon v. University of Chicago*, 559 F.2d 1063, 1072 and 1083 (7th Cir. 1976, 1977), both in the original decision and on rehearing, the Seventh Circuit acknowledged (p. 1083) that "*Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI that would mandate implication of a private right of action here under the comparable provisions of Title IX [Section 901]." It would seem equally clear that the Seventh Circuit has repudiated that portion of its *Lloyd* opinion that relied upon *Lau* for the proposition that Section 504 gives rise to a private right of action. *Lau* is no longer thought to provide a precedential base for imply-

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[10] In *Lau*, the Court held that a public school system's failure to provide English instruction for 1800 students of Chinese ancestry who did not speak English was a denial of an equal educational opportunity and hence violative of Section 601. The suit had been brought as a class action, but the Court did not discuss or confront the problem as to the right to bring such a suit. See 414 U.S. at 568. Mr. Justice Blackmun's concurrence stressed the large number of children involved who were being deprived of any meaningful education. See 414 U.S. at 572. Mr. Justice Stewart's concurrence stated that the critical question at issue was whether certain H.E.W. guidelines and regulations went beyond the authority of Section 601. 414 U.S. at 571.

ing a private right of action under Section 504, or any analogs thereof.

Further elucidation of this matter is likely upon this Court's review of the *Cannon* decision, now awaiting oral argument before the Court. No. 77-926.

(2) Alternatively, the *Lloyd* court held that a private right of action could be had under Section 504 by resort to the doctrine of implication, as developed by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1974). But it is questionable whether the second and third facets of that doctrine,[11] relating to legislative intent, have been satisfied in the case of Section 504. In commenting on the 1974 amendments to the Rehabilitation Act, the Senate Committee on Labor and Public Welfare noted that Section 504 would "permit a judicial remedy through a private action," but seemingly only after there had been some administrative implementation of a compliance program.[12] There is not a word in Section 504 or in its legislative history that permits or contemplates an independent private action by the handicapped person prior to any kind of administrative action by the H.E.W.

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[11] In *Cort*, this Court found four factors relevant in determining whether a private judicial remedy is implicit in a statute not expressly providing one: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally related to state law, thus rendering it inappropriate to infer a cause of action based on federal law. 422 U.S. at 78.

[12] S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974), reprinted at [1974] U.S. Code & Admin. News, 6373, 6390-6391.

Indeed, the *Lloyd* court permitted a private action in that case only because no administrative enforcement procedures had at that time been established, an omission that has now been cured. In footnote 29 of the *Lloyd* opinion, 548 F.2d at 1286, the Seventh Circuit stated:

> "We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review . . . . And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to *a posteriori* judicial review."

Since a "meaningful administrative enforcement mechanism" has now been established, the time has come to fill in what was deliberately left open by the *Lloyd* footnote, i.e., to determine if only a post-administrative judicial review is possible under Section 504. Where, as in the instant case, a private suit is brought that is clearly of the pre-administrative variety, it is no longer possible simply to cite the *Lloyd* ruling – as the Fourth Circuit did – as authority for implying a pre-administrative private right of action from the stark language of Section 504. Only this Court can remove the cloud of uncertainty as to what kinds of private rights of action, if any, can be instituted by handicapped individuals under Section 504.

(3) If some sort of private right of action is to be found at the post-administrative stage, the doctrine of exhaustion

of administrative remedies, as well as the doctrine of primary jurisdiction, might become dispositive of any attempt by a handicapped individual to institute suit at the pre-administrative stage. Several district courts, attempting to follow the implications of the *Lloyd* decision, have barred private suits under Section 504 where the plaintiffs have not exhausted the new H.E.W. administrative remedies dealing with discrimination complaints. *Doe v. New York University*, 422 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977); and see *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977) (primary jurisdiction).

The Fourth Circuit sought to avoid the implications of the exhaustion and primary jurisdiction doctrines, which had been raised at the rehearing stage, by suggesting that the District Court consider these matters on the remand. See footnote 9 of the opinion below, p. 11a, *infra*. Just why a remand was necessary to resolve such legal propositions was not made clear. Such matters should and can be considered and resolved as part of the continuing problem of determining what private remedies are available under Section 504 and when they may be invoked.

Here, too, these problems need definitive resolution by this Court.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472

Counsel for Petitioner

October 27, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1237

Frances B. Davis,

Appellant,

v.

Southeastern Community College,

Appellee.

Disability Rights' Center and
Mr. James Cherry,

Amicus Curiae.

ORDER

The appellant's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. One judge in active service requested a poll on the suggestion for rehearsing en banc but the suggestion did not carry. Judge Russell and Judge Widener dissent from the denial of rehearing en banc and they would affirm the judgment of the district court.

IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Butzner. Judge Haynsworth dissents from the denial of the petition for rehearing.

Filed June 29, 1978

For the Court,

/s/ William K. Slate, II
Clerk

Frances B. DAVIS, Appellant,

v.

SOUTHEASTERN COMMUNITY COLLEGE, Appellee.

No. 77-1237.

United States Court of Appeals,
Fourth Circuit.

Argued Jan. 9, 1978.

Decided March 28, 1978.

Marc P. Charmatz and Sy Dubow, The National Center for Law and The Deaf Legal Defense Fund, Washington, D.C. (Philip A. Diehl and Warren L. Pate, Moses, Diehl & Pate, Raeford, N.C., on brief), for appellant.

Edward L. Williamson, Whiteville, N.C. (Benton H. Walton, III, Williamson & Walton, Whiteville, N.C., on brief), for appellee.

Charles E. Hill, Douglas L. Parker and Mark A. Barenstein, Washington, D.C., (on brief) for amicus curiae Disability Rights Center and James Cherry.

Before HAYNSWORTH, Chief Judge, and BUTZNER and HALL, Circuit Judges.

K. K. HALL, Circuit Judge:

Frances B. Davis, a Licensed Practical Nurse ("LPN"), appeals from a final judgment entered against her in a civil action filed under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, ("the Act"). The Southeastern Community College ("college"), located in North Carolina, was the named defendant, and Ms. Davis complained that the

college unlawfully denied her admittance to the college's Associate Degree Nursing Program ("program"), which would ultimately lead to certification as a Registered Nurse ("RN"), because of her admitted hearing disability.

Following a trial to the court, the district judge held: (1) that the plaintiff did not have to exhaust further administrative remedies as a precondition to suit; (2) that the plaintiff was not denied any constitutional or property rights, under either due process or equal protection clauses of the Constitution, [42 U.S.C. § 1983]; and (3) that the plaintiff, although plainly a "handicapped individual" within the meaning of 29 U.S.C § 706(6), was not discriminated against within the strictures of 29 U.S.C. § 794. *Davis v. Southeastern Community College*, 424 F.Supp. 1341 (E.D.N.C.1976). We affirm in part, and vacate in part and remand.[1]

I.

PRIVATE RIGHT OF ACTION

[1] Although the district court did not make a specific legal finding as to whether or not the plaintiff could pursue a private right of action under Section 504 of the Act, we believe that such a finding was at least implicit, and was legally sound. On this point, we affirm,[2] and we adopt the sound reasoning of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-87 (7th Cir. 1977). *See also United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2nd Cir. 1977); *Hairston v. Drosick*, 423

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[1]Except as supplemented in this opinion, the facts are adequately set forth by the district court in its published opinion, *Davis v. Southeastern Community College, supra.*

[2]In a later case, the same district judge that decided the case now before us squarely held that Section 504 of the Act did confer a private right of action to sue upon a handicapped person. *See Barnes v. Converse College*, 436 F.Supp. 635, 638 (D.S.C. 1977).

F.Supp. 180 (S.D.W.Va.1976); *Sites v. McKenzie*, 423 F.Supp. 1190 (N.D.W.Va.1976).

II.

ADMINISTRATIVE EXHAUSTION

[2] As the district court noted, once the plaintiff was formally denied admission to the college's nursing program, she sought an additional, yet informal, reconsideration through the Office of the President of the college. In fact, her application was reconsidered by a committee of nurses who were on the staff at the college and who availed themselves of all relevant materials and records concerning the plaintiff. They reaffirmed their refusal to admit plaintiff to the nursing program. *Davis v. Southeastern Community College, supra*, at 1343-4, ¶¶9, 10.

On appeal, the college contends that since it had an established grievance procedure,[3] and since the plaintiff did not pursue her denial of admittance to the nursing program through the tiers of that grievance procedure, then her suit in federal court is effectively barred.

We disagree with the college, hold that the processing of plaintiff's grievance beyond that which she had already achieved would indeed have been "futile," and affirm that holding for the reasons adequately stated by the district

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[1]The procedural framework at the college for airing grievances was generally structured as follows:

a. Discussion with the person who was the source of grievance;

b. Written presentation of the grievance to the student's dean and to the staff members' superior or dean;

c. Appeal to a special grievance committee composed of seven members (three students; two faculty members; two administrators);

d. Appeal thereafter to the President of the College.

Defendant's Exhibit 25.

court. *Davis v. Southeastern Community College, supra*, at 1343-4, at ¶¶9, 10, and A.[4]

III.

THE SECTION 504 CLAIM

Our holding on the merits of plaintiff's Section 504 claim is rather narrow. We vacate and remand that portion of the district court judgment which has not been affirmed here, and hold that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability. The college may consider such other relevant subjective and objective factors as it deems appropriate, consonant of course with a fair and essentially uniform application of those same subjective and objective factors utilized in the consideration of other candidates for enrollment in the nursing program. For instance, past academic performances would undoubtedly be a highly relevant factor governing admissibility to the nursing program.[5]

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[4]Since we dispose of this appeal on the Section 504 grounds, we only note in passing that plaintiff's suit was also brought under 42 U.S.C. § 1983 in which administrative exhaustion is not required as a precondition to suit. *See McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976).

[5]At oral argument, we were informed by counsel for the college that the plaintiff had scored well below average on the reading placement test.

The record on plaintiff's academic performance is at best mixed. The plaintiff's transcripts of prior academic work were made part of the record in this case and they reflect above average performance with a range of grades from C to A.

We express no opinion concerning the scholastic suitability of the plaintiff to pursue her studies toward an RN degree. However, the record does reflect that the large number of applicants for a limited number of available positions in the nursing program undoubtedly creates keen competition for admission to the nursing program.

We reach this result because the district court erred when it found that plaintiff was not "otherwise qualified" pursuant to Section 504 of the Act, 29 U.S.C. § 794, for admission to the college's nursing program.

The court below defined the key statutory terminology, "otherwise qualified," as contained in 29 U.S.C. § 794, in their ordinary common meaning since, at the time the case was decided, there had not been any definitive interpretations of those terms. *Davis v. Southeastern Community College, supra,* at 1345, decided December 22, 1976. Thus, "otherwise qualified" was defined to mean that the plaintiff had ". . . to [be] otherwise able to function sufficiently in the position in spite of [her] handicap, if proper training facilities [were] suitable and available." *Id.* However, since plaintiff's hearing deficiencies would prevent her from safely performing the clinical training leading to her RN degree and would, after graduation, restrict her in the pursuit of her proposed profession, then in the district court's view she was not "otherwise qualified." *Id.*[6]

[6]We do not have before us the question of "limited" verses "unlimited" certification of the plaintiff as an RN. It was touched on briefly at oral argument, however.

Plaintiff's ability to read lips aids her in overcoming her hearing disability; however, it was argued that in certain situations such as in an operating room environment where surgical masks are used, this ability would be unavailable to her.

Be that as it may, in the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly the plaintiff could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities.

If the plaintiff meets all the other criteria for admission in the pursuit of her RN career, under the relevant North Carolina statutes, N.C.Gen.Stat. §§ 90-158, *et seq.*, it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers.

Approximately six months after the district court decided *Davis*, on June 3, 1977, the regulations implementing Section 504 of the Act, promulgated by the Department of Health, Education and Welfare ("HEW"), became effective.[6a] 42 Fed.Reg. 22676 (May 4, 1977). Among these regulations, now embodied in 45 C.F.R. Part 84, is one which addresses the particular definitional problem presented on this appeal. Title 45 C.F.R. § 84.3(k)(3) requires that:

> With respect to post-secondary and vocational education services [an otherwise qualified handicapped person is one] . . . who meets the *academic* and *technical* standards requisite to admission or participation in the recipient's education program or activity.

[Emphasis added.][7]

The official explanation provided by HEW for this definition indicates that:

> . . . both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all nonacademic admissions criteria that are essential to participation in the program in question.

42 Fed. Reg. at 22687.

[3] Thus, we hold the district court erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program, *Davis v. Southeastern Community College, supra,* at 1345, rather than by

[6a]See *Cherry v. Mathews*, 419 F.Supp. 922 (D.D.C.1976), for the history of the suit against HEW to compel it to promulgate regulations under § 504 of the Act, 29 U.S.C. § 794. *See also* n.9, *post.*

[7]HEW construes "qualified" and "otherwise qualified" synonymously under the regulations. 42 Fed.Reg. at 22686.

focusing upon her academic and technical qualifications as required by the newly promulgated regulations. We reach this result by applying the law which is in effect at the time we render our decision, *Thorpe v. Housing Authority*, 393 U.S. 268, 281, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); *see also Cort. v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), and note that other courts of appeals have been required to vacate and remand Section 504 cases to the lower courts for reconsideration in light of applicable regulations which antedated their decisions. *See United Handicapped Federation v. Andre*, 558 F.2d 413, 416 (8th Cir. 1977); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1287-8 (7th Cir. 1977).[7a]

IV.

AFFIRMATIVE RELIEF

Since this case will be returned to the district court for further proceedings, we believe it would be appropriate, as guidance for the court below, to briefly discuss plaintiff's claim that the district court also erred by failing to consider that the college could be required to modify the nursing program so as to accommodate the plaintiff and her hearing disability. Plaintiff bases her entitlement to such "affirmative relief" also upon Section 504 of the Act, 29 U.S.C. § 794, and upon certain designated sections of the HEW regulations under Section 504.[8]

[7a] We limit our holding and our interpretation of the above-quoted regulations to the facts of this particular case. We do not, at this time, absent a more fully developed record below, wish to expand further upon the regulations, their reasonableness, or their scope.

[8] Plaintiff relies upon 45 C.F.R. §§ 84.42(a); 84.43(c); 84.44(a); 84.44(d); and 84.12(a). As hereinbefore noted, this listing of regulations is furnished only as illustrations to the district court of the argument advanced for the first time in this court on appeal. Of course, as we note in this opinion, repeatedly, the application and interpretation of the HEW regulations lie, in the first instance, with the district court.

The position of the college was relatively clear — it was not prepared, from a faculty viewpoint, to adequately supervise and train the plaintiff during her clinical training. Therefore, it could not modify its program to compensate for plaintiff's hearing disability.

We believe the district court should give close attention, on remand, to the regulations upon which plaintiff relies, which are cited in footnote 8 of this opinion, and especially to 45 C.F.R. § 84.44(a), *Academic requirements*, which requires that:

> A recipient . . . shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. * * Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion 9f degree requirements, and adaptation of the manner in which specific courses are conducted.

and to 45 C.F.R. § 84.44(d)(1), *Auxiliary aids*, which requires that:

> A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

Additionally, precedent likewise supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive. *See e.g. United Handicapped Federation v. Andre*, 558 F.2d 413, 415-6 (8th Cir. 1977);

Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1281-84 (7th Cir. 1977); *Barnes v. Converse College*, 436 F.Supp. 635, 637 (D.S.C.1977); *Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D.W.Va. 1976).

V.

OTHER CLAIMS— DAMAGES, DUE PROCESS, AND EQUAL PROTECTION

Both parties to this appeal presented other issues for our consideration. For the reasons stated below, we decline to pass upon them.

The college complains that plaintiff's attempt to secure monetary damages against it is precluded by the Eleventh Amendment immunity accorded the state, and its institutions. The district court below did not rule upon any damage request by the plaintiff, and indeed, ruled against her. Plaintiff did not raise the damage question on appeal, and we thus hold that any issue of damages could not, under any conceivable appellate theory, be before us and decline to discuss it further.

[4] The plaintiff also argued that the district court's decision, upholding her exclusion from the nursing program, denied her due process of law and the equal protection of the laws under the Fourteenth Amendment of the United States Constitution. Because this appeal, thus far, has been disposed of on nonconstitutional, statutory grounds, we have no need to reach the constitutional questions which the plaintiff presented below. *See Gurmankin v. Costanzo*, 556 F.2d 184, 186 (3rd Cir. 1977); *Lloyd v. Regional Transportation Athority*, 548 F.2d 1277, 1280 (7th Cir. 1977).

Accordingly, the judgment is

AFFIRMED in part; VACATED in part; and REMANDED.[9]

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[9]The district court entered judgment for the defendant on December 22, 1976. *Davis v. Southeastern Community College*, *supra*. Thereafter, HEW promulgated the regulations applicable to Section 504, see n.6, *supra*, which regulations *presumably* became effective on June 3, 1977. 42 Fed.Reg. 22676 (May 4, 1977); *but see* 45 C.F.R. §84.6(c).

On remand, and since the advent of the HEW regulations, the district court might also deem it advisable to consider other legal issues which we did not reach in this opinion, namely: (1) What is the effective date concerning the relevant sections of the HEW regulations, if any? (2) Did the promulgation of the Section 504 regulations by HEW, and specifically, 45 C.F.R. §§ 84.6-84.10, and separately 45 C.F.R. §§ 80.6-80.10 and 45 C.F.R. Part 81 create administrative relief that must be exhausted? (3) Is the doctrine of "primary jurisdiction" applicable, and if so, how? (4) Should administrative exhaustion and/or "primary jurisdiction" be applicable, should plaintiff be awarded any relief *pendente lite*?

Of course, we express no opinion on the merits concerning these issues, but at least one court has grappled with these issues that are not before us. *Crawford v. University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C.—Magistrate's Findings and Order adopting same, entered Sept. 1, 1977, and Nov. 1, 1977, respectively; C-77-173-D; Ward, U.S.D.J.) (deaf handicapped graduate student seeking to compel provision of an interpreter to aid him in completing his school work); *see also Lloyd v. Regional Transportation Authority*, *supra*, at 1286, n.29.

APPENDIX B

Frances B. DAVIS, Plaintiff,

v.

SOUTHEASTERN COMMUNITY COLLEGE, Defendant.

Civ. A. No. 75-0041-CIV-3.

United States District Court,
E.D. North Carolina,
Fayetteville Division.

Dec. 22, 1976.

Warren L. Pate, and Philip A. Diehl, Raeford, N.C., for plaintiff.

Edward Williamson, of Williamson & Walton, Whiteville, N.C., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HEMPHILL, District Judge.

This is an action brought by plaintiff under the provisions of 42 U.S.C. § 1983 alleging that the defendant institution denied plaintiff equal protection of the law and due process in denying her admission to the Associate Degree Nursing Program of defendant institution, and under 29 U.S.C. § 794 alleging that plaintiff was discriminated against by the defendant institution in denying her admission because of a hearing disability. After hearing and considering the testimony adduced at trial, and considering the various pleadings, exhibits, and submissions taken into evidence,

including a review of the court's notes taken at the time of trial, upon the credible evidence presented, the court publishes the following:

FINDINGS OF FACT

1. The court has jurisdiction of the subject matter of this claim pursuant to 28 U.S.C. § 1343(3).

2. That plaintiff is a citizen and resident of Robeson County, North Carolina, and was enrolled at the defendant institution during the 1973-74 academic year in the College Parallel program. This College Parallel program is designed as a preparatory program for entrance into the Associate Degree Nursing Program.

3. That the defendant institution is a community college established under Chapter 115-A of the General Counsel Statutes of North Carolina as a public educational institution operating by and through a duly appointed and qualified Board of Trustees as authorized by said statute.

4. That the Associate Degree Nursing Program was one of the academic programs administered by the defendant institution and that plaintiff made application for admission to said program for the fall quarter beginning in September 1974. It appears uncontroverted from the testimony adduced at trial that the purpose for the establishment and maintenance of the Associate Degree Nursing Program was to train people for licensing as Registered Nurses pursuant to the statutes of North Carolina. In accordance with the admission criteria of the college for the Associate Degree Nursing Program, the plaintiff was interviewed by professional members of the college staff involved in the nursing program for the purpose of evaluating the suitability of the plaintiff for admission to the Associate Degree Nursing Program. The reports of such evaluation have been offered into evidence (see plaintiff's exhibits Nos. 23 and 34) and commented on

in testimony and conclude that the plaintiff was not qualified to be admitted to the program. Subsequently an Admissions Review Committee considered the application of plaintiff and determined by reason of her severe hearing impairment that she is not a qualified applicant for training as a Registered Nurse.

5. That plaintiff successfully completed her schedule of classes for the 1973-74 school term prior to her application for admission into the Associate Degree Nursing Program. Plaintiff also is a duly qualified Licensed Pratical Nurse, having been granted such professional license by the State of North Carolina in 1967, and which license is currently in good standing. From the testimony presented at trial, it appears that a Licensed Practical Nurse, unlike a Licensed Registered Nurse, operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication.

6. That the defendant institution had an established criteria for admissions of students to the Associate Degree Nursing Program and the standards and objectives established by the college included an evaluation of the physical condition of the applicant. Furthermore, there were in excess of 100 applicants for admission to the Associate Degree Nursing Program and only 45 available positions to be filled for the quarter in which plaintiff had applied for admission.

7. That plaintiff had a severe impairment of her ability to hear, which was detected early in the admission process. As a result of this condition, she was referred to an audiologist at Duke Hospital to advise and to determine the extent of her hearing difficulty. The hearing test administered by Dr. Burton B. King, Audiologist, indicated that plaintiff had bilateral sensorineural hearing loss. (Plaintiff's exhibits Nos. 6, 7 and 8). This report indicated that plaintiff has a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear. She has a speech discrimination

loss which results in remarkable difficulty in understanding speech because of the distortion in her hearing. However, she understands speech better in her right ear. She wears a hearing aid to assist her hearing in the right ear and she uses her vision to supplement her hearing and understanding speech. In this respect she is an excellent lip reader and although she does not possess normal hearing, she is skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others. She is well aware of gross sounds occurring in the listening environment but can only be responsible for speech spoken to her or when the talker gets her attention and allows her to look directly at the talker. The hearing aid improves her hearing level to the outer limits of normal hearing levels.

8. That a report of the audiologist was reviewed by Mary McRee, Executive Director of the North Carolina Board of Nursing, who advised the Director of Nursing at the defendant institution that the plaintiff's abilities, based upon the report of the audiologist, would be inadequate to the patient's needs, "in fact, it would be inadequate for her probably to identify all of the patient's needs for which she would be accountable or even to pick up some clues to situations which could be quite critical to the point of life, death situations." (See plaintiff's exhibits Nos. 10 and 11.) It was also brought out in testimony that in many situations such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgial masks which would make lip reading impossible. Additionally, in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means.

9. That the defendant institution denied the plaintiff's application for admission upon the findings of the medical tests performed with respect to her inability and incapacity

to serve in the Associate Degree Nursing Program and their feelings that she would be unable to serve as a Registered Nurse on completion of such program.

10. That following the denial of plaintiff's application for admission by the Admissions Committee, the plaintiff, in an informal and nonscheduled visit to the Office of the President of the defendant institution in the month of June, 1974, asked that her application be again reviewed and reconsidered. This was done by a committee of the nurses who were on the staff of said college, and that all of the material and records then available were sent to said committee who again voted to deny plaintiff's application. After having her application reconsidered and refused a second time the plaintiff made no further attempt to gain review through college procedures. Although it appears from the record that the defendant institution had a procedure for resolving intramural grievances, it is obvious that after consideration, reconsideration and final refusal of the plaintiff's application for admission, that all parties concerned knew that the institution of any such procedures would be, in essence, futile.

11. That plaintiff offered no testimony at the trial of the case but rested her case upon the introduction of the exhibits which were offered into evidence by stipulation of the parties and which constitute a part of the proper record. That the defendant offered the testimony of Mrs. Annie Odum, who was associated with the Nursing Program at the defendant college and who had been one of the persons who interviewed the plaintiff with respect to her suitability and qualifications to be admitted to the Associate Degree Nursing Program. That defendant further offered Mrs. Virginia Riggio who was the Director of Nursing at the defendant institution when plaintiff's application was submitted and who also reviewed the record of plaintiff with respect to her suitability and qualifications for the program. Defendant further offered Mrs. Julie Stocks who was counselor to the plaintiff upon her admission to the

college, a Dr. W. Ronald McCarter, President of Southeastern Community College, Mrs. Peggy Berry, staff members of the college and member of the Admissions Committee, Dr. Dan Moore, Dean of the college, and Mrs. Sue Shaw, Clinical Instructor at the college. The evidence adduced from said witnesses was to the effect that the plaintiff was not qualified or suitable for the Associate Degree Nursing Program by reason of her hearing disability.

12. The defendant institution offered into evidence as one of its exhibits the admission criteria of the college to the Associate Degree Nursing Program which was further testified to by the defendant's witnesses who had evaluated the qualifications and suitability of the plaintiff for the Associate Degree Nursing Program. The President of the College and the Dean of the College also testified with respect to the procedures and their application to the case at bar.

Having made the foregoing findings of fact, the court, reaches the following:

CONCLUSIONS OF LAW

A. The court finds it unnecessary to determine whether plaintiff was required to exhaust all administrative remedies prior to bringing this suit under the cited cases of *Damico v. California*, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967), and *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Even if plaintiff had additional administrative remedies which could be followed, it is apparent to the court that resort to these remedies would have proved futile to the plaintiff.

B. That defendant institution was empowered by the Legislature of North Carolina pursuant to North Carolina General Statute, § 108-14(4) (1963) to apply the standards and requirements for admission and graduation of students and other standards established by the State Board of

Education. The admission to a state community college is a privilege and not by itself a constitutional or property right, subject to the exception that the rules and regulations for admission are not arbitrary or unreasonable. *Flemming v. Adams*, 377 F.2d 975 (10th Cir. 1976), *cert. denied* 389 U.S. 898, 88 S.Ct. 219, 19 L.Ed.2d 216; *Keys v. Sawyer*, 353 F.Supp. 936 (S.D.Tex.1973); *see also, San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). The plaintiff has offered no testimony to attack the accuracy or reasonableness of the admissions standards of the defendant institution nor has she sent in any evidence of any arbitrary or capricious action on the part of the defendant institution in denying plaintiff admission to the Associate Degree Nursing Program. Furthermore, it appears from the testimony that the single major factor in the defendant's refusal to allow admissions to plaintiff was her projected inability to be licensed as a Registered Nurse after graduation (see plaintiff's exhibits Nos. 11, 13 and 14). A state has a great responsibility to provide training facilities for producing qualified persons for delivering health care to society. In view of the shortage of such personnel and the great number of applicants for the spaces available in such facilities, it is completely reasonable and logical for the state to limit enrollment to such persons as are able to meet professional qualifications upon graduation. Additionally, from the evidence presented at trial, it appears that it would be difficult and, in fact, dangerous for plaintiff to even attempt the clinical portion of the training program. Thus, there is a complete lack of evidence and testimony in the case to establish a denial of the constitutional or property right by the defendant college to the plaintiff.

C. The plaintiff also contends that 29 U.S.C. § 794 keeps defendant institution from refusing to allow plaintiff's admission on the basis of her hearing disability. This section reads:

> Nondiscrimination under Federal grants
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 706(6) defines "handicapped persons" as follows:

> For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

It is the opinion of the court that plaintiff plainly falls within the statutory definition.

Plaintiff contends, quite simply, that by violating 29 U.S.C. § 794, defendant has denied her rights guaranteed under the "law of the United States," thus giving rise to a cause of action under 42 U.S.C. § 1983. 29 U.S.C. § 794 is part of a comprehensive legislative scheme to provide greater opportunity to handicapped individuals in the United States. This particular section of the Act, which was passed in 1973, has yet to be interpreted by the federal courts. For the purposes of this case, the two most important words in this section are the words "otherwise qualified". In construing statutes words should be given, whenever possible, their ordinary common meaning. In absence of prior legal definitions of this term, a resort to Webster's Third New International Dictionary reveals that the word "otherwise" is defined as "in other respects". "Qualified" is defined as "fitted for and given purpose". While these definitions are certainly not surprising, they

may be of some guidance in interpreting the meaning of the statute. Reasonably construed, these words qualify the passage to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap, renders the person unable to fully and effectively participate in the activity. By way of an illustration, under this section it would most probably be impermissible to exclude a blind or deaf person from admission to a law school, if academically qualified. However, reason dictates that it would be entirely permissible to exclude a person without sight from a position as a truck driver or to refuse a person who must read lips to a position as a telephone operator. Otherwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available. The major problem with the plaintiff's contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations. Defendant presented testimony from several witnesses that plaintiff would be unable to properly perform in the program even with an improved hearing aid. The plaintiff put up no testimony at all on this point except to elicit an admission on cross examiantion that with special training and individual supervision she could perform adequately in some selected fields of nursing. In view of this interpretation of the statute and the plaintiff's failure to establish her ability to complete the program and function as a Registered Nurse, the court can find no violation of 29 U.S.C. § 794 and thus no violation of 42 U.S.C. § 1983 based upon it.

In accordance with the foregoing reasons, let judgment be entered in favor of the defendant in this action.

AND IT IS SO ORDERED.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington D.C. 20036
Attorney for the American
Council on Education

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the
Commonwealth of Massachusetts

GERALD GORNISH
Attorney General of Pennsylvania
Capitol Annex, Room 1
Harrisburg, Pennsylvania 17120
Attorney for the
Commonwealth of Pennsylvania

J. MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

(Counsel continued inside front cover)

The Daily Record Co., Baltimore, Md. 21202

AVRUM GROSS
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Attorney for the
State of Alaska

JOHN A. LaSOTA, JR.
Attorney General of Arizona
200 State Capitol Building
Phoenix, Arizona 85007
Attorney for the
State of Arizona

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the
State of Connecticut

RICHARD R. WIER, JR.
Attorney General of Delaware
Wilmington Tower Bldg.—4th Floor
Wilmington, Delaware 19801
Attorney for the
State of Delaware

ROBERT L. SHEVIN
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304
Attorney for the
State of Florida

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for the
State of Georgia

RONALD Y. AMEMIYA
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813
Attorney for the
State of Hawaii

WAYNE L. KIDWELL
Attorney General of Idaho
State Capitol
Boise, Idaho 83720
Attorney for the
State of Idaho

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
State Capitol, P.O. Box 44005
Baton Rouge, Louisiana 70804
Attorney for the
State of Louisiana

FRANCIS B. BURCH
Attorney General of Maryland
1400 One South Calvert Building
Baltimore, Maryland 21202
Attorney for the
State of Maryland

A. F. SUMMER
Attorney General of Mississippi
Carroll Gartin Justice Building
Jackson, Mississippi 39205
Attorney for the
State of Mississippi

JOHN D. ASHCROFT
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
Attorney for the
State of Missouri

MICHAEL T. GREELY
Attorney General of Montana
State Capitol
Helena, Montana 59601
Attorney for the
State of Montana

PAUL L. DOUGLAS
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509
Attorney for the
State of Nebraska

THOMAS D. RATH
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
Attorney for the
State of New Hampshire

JOHN J. DEGNAN
Attorney General of New Jersey
State House Annex, Second Floor
Trenton, New Jersey 08625
Attorney for the
State of New Jersey

(Counsel continued inside back cover)

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INTERESTS OF THE AMICI CURIAE

The interests of the amici curiae and their reasons for urging this Court to review the decision of the United States Court of Appeals for the Fourth Circuit in *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), are as follows:

The amici are a majority of the States and the American Council on Education, the nation's largest association of colleges and universities.[1] All of the amici fully support equal rights for handicapped individuals, as well as the purpose of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Nevertheless, because the amici have an obligation to comply with the Act and to bear, without any federal assistance, the enormous financial and other burdens associated with its administration, they have an important stake in its reasoned interpretation.[2]

The amici are concerned that a one-sentence prohibition with no particular legislative history is being transformed by administrative excess and judicial inventiveness into a tool of oppression not contemplated by Congress. For example, the Department of Health, Education, and Welfare ("HEW") in regulations

[1] The American Council on Education, a nonprofit corporation organized under the laws of and located in the District of Columbia, is a membership organization composed of 1,291 nonprofit institutions of higher education and 169 national and regional educational associations and organizations. One of the major functions of the American Council on Education is to speak for colleges and universities on matters of national significance. Because its members include the overwhelming majority of nonprofit institutions of higher education, the American Council on Education believes itself uniquely positioned to represent the interests of the higher education community on matters of national importance such as the issues presented to this Court in the pending petition. Written consent of the parties has been granted for participation by the American Council on Education in this brief.

[2] In a cost survey prepared for HEW, the estimated *annual* pecuniary cost of compliance with the Act has been set at 3.2 *billion* dollars. D. O'Neill, *Discrimination Against Handicapped Persons — The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance* at 65 (May 4, 1977) (unpublished report prepared for the HEW Office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77).

implementing the basic prohibition of section 504[3] has excised key statutory language[4] and has imposed affirmative action requirements on entities receiving federal funds where Congress with apparent deliberation placed none.[5] More importantly, the court of appeals in the present case has gone far beyond the HEW regulations in fashioning a definition of an "otherwise qualified" handicapped individual which is at war with common sense, the intent of Congress, and the regulations themselves. In addition, a majority of that deeply-divided court[6] refused to require the plaintiff to follow the administrative route specified in the HEW regulations, without analysis implied a private right of action under section 504, and without legal foundation held that the statute required a public college to modify its courses and programs to compensate for the disability of a single student.

The amici submit that this overextension, manipulation, and misapplication of section 504 reflects a lack of "sensitivity to the legitimate interests of both State and

[3] Section 504 provides that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[4] The word "solely" was eliminated in the HEW regulations. 45 C.F.R. § 84.4(a) (1977).

[5] Although Congress imposed affirmative action obligations on certain federal contractors in section 503 of the Act, 29 U.S.C. § 793, section 504 is silent.

[6] Upon submission of a petition for rehearing and suggestion for rehearing en banc to the six members then in regular active service on the court, Judges Russell and Widener dissented from the denial of rehearing en banc and indicated they would affirm the judgment of the district court; in addition, Chief Judge Haynsworth dissented from the denial of the petition for rehearing. 574 F.2d at 1163 (4th Cir. 1978).

National Governments," (*Younger v. Harris*, 401 U.S. 37, 44 (1971)), and impairs the States' "ability to function effectively within . . . [the] . . . Federal system." *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). In addition, this view of section 504 gravely endangers sound academic principles and undermines academic freedom, causing concern to all institutions of higher education, both public and private. For these reasons review of the Fourth Circuit decision is essential.

QUESTIONS PRESENTED

I. Whether section 504 of the Rehabilitation Act of 1973 must be construed to require an institution of higher education receiving federal funds to admit a handicapped person whose handicap makes it impossible to participate effectively in the educational program and the career to which it leads?

II. Whether section 504 requires an institution to change its academic requirements or take other action to compensate for the disability of a handicapped applicant for admission?

III. Whether section 504 impliedly creates a private right of action that may be enforced by an individual without resort to federal administrative remedies?

REASONS FOR GRANTING THE WRIT

REVIEW IS NECESSARY TO SETTLE IMPORTANT QUESTIONS OF FEDERAL LAW BECAUSE THE COURT OF APPEALS HAS OVEREXTENDED AND MISAPPLIED SECTION 504 CONTRARY TO THE INTENT EXPRESSED BY CONGRESS AND BY HEW IN ITS IMPLEMENTING REGULATIONS.

In section 504 of the Rehabilitation Act of 1973, Congress established a mechanism to prevent discrimination against handicapped persons by grant recipients in their utilization of federal financial assistance.

Although a significant step in fostering equal opportunity for the handicapped, section 504 is a terse and carefully worded statute. Unlike the basic prohibitions of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), section 504 is framed in less absolute terms. A handicapped person may not be denied benefits "solely" by reason of his or her handicap and such an individual must be "otherwise qualified" to come within the protections of the statute.

Focusing on this language, the district court correctly construed section 504 to mean that "no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976). Thus, an applicant for admission to a college receiving federal aid must be able to function sufficiently in courses *in spite of* his or her handicap. *Id.*

A panel of the court of appeals, although conceding the reasonableness of this construction, 574 F.2d at 1160, held applicable the definition contained in subsequently promulgated HEW regulations implementing the Act *which it said* differed markedly from the district court's. The panel concluded that under the Act and the HEW regulations, a person must be admitted to a federally funded program *without regard to* his or her disability. 574 F.2d at 1160.

It is true, as noted in the panel opinion, that in deciding if a person is "otherwise qualified," the focus should be upon the issue of whether a handicapped individual can meet the academic and technical qualifications of a program. *Id.* at 1161. Nevertheless, this focus of inquiry, contrary to the panel's holding, must logically take into consideration the *nature* of a

person's handicap to see if he or she is qualified for admission into a particular program of study *in spite of* that handicap.

Indeed, this is the unequivocal position expressed in the HEW regulations. For example, in its official explanation of the meaning of "qualified handicapped person" in the regulations, that agency states:

> "Qualified handicapped person." Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word, "otherwise," is necessary in order to comport with the intent of the statute because, *read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap.* Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

45 C.F.R. § 84 app. A, at 376 (1977).

Adherence to the "without regard to" language of the court of appeals rather than the district court's "in spite of" language would create, quite literally, the spectre of blind bus drivers adverted to in the HEW analysis of its own regulations. Sound logic and common sense support the district court and HEW on this important question of federal law.

As detrimental to public and private beneficiaries of federal funds as the lower court's construction of the words "otherwise qualified" in section 504 is its determination to the effect that the statute imposes an affirmative action requirement. To contend that affirmative action is mandated or authorized under section 504 of the Act is to ignore the statutory language which on its face states that it is a statute mandating only that there be no "discrimination."

Nowhere in the short forty-eight words of section 504 is there an expression relating to affirmative action or preferential treatment — it provides only for equal access. This is of course unlike its counterpart, section 503 of the Act, 29 U.S.C. § 793, which requires federal contracts of more than $2,500 to contain a provision obligating the contractor to "take affirmative action to employ and advance in employment qualified handicapped individuals." *See* Note, *Rehabilitating the Rehabilitation Act of 1973,* 58 Boston Univ. L. Rev. 247, 270 (1978) ("[A]lthough section 503 imposes an affirmative action duty upon employers, section 504 imposes only a negative duty not to discriminate. Therefore, the classification of federal funds as a section 503 contract or a section 504 financial assistance will determine the nature and extent of the legal obligations owed by an employer . . . .").

Nevertheless, equal access does not require public or private institutions of higher education to open their doors to unqualified students. Only a policy of preferential treatment for past discrimination would suggest such a standard, and section 504 was not intended to redress the wrongs of the past or alleviate past discrimination. *Cf. United Air Lines v. Evans,* 431 U.S. 553, 558 (1977). Its sole purpose was to effectuate nondiscrimination in the utilization of federal financial assistance.

Nor does the lower court position on affirmative action derive any support from the HEW regulations implementing section 504. The statute contains no directive or authority for issuance of regulations and perhaps the only authority for any regulations is

Executive Order 11, 914, 41 Fed. Reg. 17,871 (Apr. 28, 1976), which merely allows HEW to "establish standards for determining who are handicapped individuals and *guidelines for determining what are discriminatory practices* within the meaning of §504" (emphasis added).[7] Because the affirmative action provisions of the new HEW regulations have no origin in the Act or the Executive Order, they are of dubious validity and of no help in justifying the imposition of an affirmative action requirement. *See United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976); Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse College*, 29 Mercer L. Rev. 745, 757 (1978).

Moreover, the imposition of an affirmative action requirement in section 504 whether by the court of appeals or HEW locks States and particularly educational institutions into a financial dilemma. As the court in *Barnes v. Converse College*, 436 F. Supp. 635, 638-39 (D.S.C. 1977), observed:

> Converse College is subject to regulation under 29 U.S.C. §794 because it receives federal financial assistance. None of this federal financial assistance, however, was given to Converse College for the purpose of providing auxiliary aids for the handicapped. No educational administrator needs to be reminded of the said [sic] fact that federal money means pervasive, bureaucratic federal control; and for pervasive, tyrannical bureaucratic federal control, the Department of Health, Education and Welfare knows no equal or superior . . . . This is not to say that this court is not entirely sympathetic with the spirit of federal legislation which encourages the expansion of opportunities for the handicapped. This is merely to say that if the federal government, in all its wisdom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (i.e., our taxes) for such purposes . . . .

In addition, if State beneficiaries or other entities receiving federal funds are required to expend funds on a handicapped person's behalf in order to make up for his or her disability, serious questions are raised with respect to the equal protection rights of non-disabled fellow applicants. *Cf. McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (allowing whites a cause of action under title VII and 42 U.S.C. §1981 for reverse discrimination); *Castaneda v. Partida*, 430 U.S. 482 (1977) (presumption that governing majority would not discriminate against itself insufficient basis for rejecting equal protection claim).

The lower court decision on affirmative action will also adversely impact on the autonomy and discretion of educational institutions that are so essential to maintaining academic freedom.[8] As Mr. Justice Powell noted only last term in *Regents of the University of California v. Bakke*, 98 S. Ct. 2733, 2760 (1978), "[t]he

[7] The HEW regulations stem in part from a district court order holding that section 504 impliedly required the agency to issue regulations. Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976). *But see* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947), where this Court said:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied to the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.

[8] Mr. Justice Frankfurter summarized the "four essential freedoms" that comprise academic freedom:

> . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

freedom of a university to make its own judgments as to education includes the selection of its student body." However, a glaring result of the lower court's opinion is the surrender of portions of this freedom without reason or authority. While the amici are not opposed to reasonable affirmative action obligations expressly imposed by Congress, educational officials must not be forced by shortsighted judicial or administrative fiat to give up control over course content, methods of instruction, and considered policies of admission. Accordingly, review by this Court of the decision of the court of appeals is necessary to prevent a serious and unwarranted dilution of academic freedom.

This case raises additional federal questions of nationwide importance that require prompt resolution, specifically, whether section 504 impliedly creates a private right of action and, if so, whether an individual must exhaust his or her administrative remedies available under the Act and the HEW regulations. Unlike any prior case of this Court, never has so much been implied in a statute from so little. Section 504 and the implementing regulations do not expressly authorize a private right of action. The legislative history is silent. The statute envisions and the regulations provide an elaborate administrative mechanism which can ensure remedial relief for individuals. And the threat of a cutoff of federal assistance guarantees swift enforcement of the statutory prohibition.

Only one court of appeals has devoted any analysis to the implication of a private right of action under section 504.[9] And the rationale of that case cuts against the judicial creation of such a private right. In *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th

[9] Other circuits finding such a right have done so only in conclusionary terms. *See, e.g.*, United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977), and Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).

Cir. 1977), the court implied a private right of action under section 504 for a large group of plaintiffs because at that time administrative remedial machinery did not exist to vindicate affirmative rights:

> We *expressly* leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . *But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a posteriori judicial review.*

548 F.2d at 1286 n.29 (emphasis added).

Since the promulgation of the HEW regulations, a meaningful administrative enforcement mechanism has existed for private parties, obviating the need for invention of a private right of action from a silent legislative history. Even if a private right of action should be found, because of the existence of the HEW regulations and the remedy they afford, the time is now ripe for this Court to apply to section 504 the well-established rule that a litigant is not entitled to judicial relief until the prescribed administrative remedy has been exhausted. *McKart v. United States*, 395 U.S. 185 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Recognizing the importance of this principle, a recent decision has held that a plaintiff may not bring a private action under section 504 of the Act without first exhausting the new HEW administrative remedies that were designed to investigate complaints of discrim-

ination. *Doe v. New York University*, 442 F. Supp. 522, 523-24 (S.D.N.Y. 1978):

> On paper, it now appears that, in the words of the Seventh Circuit in *Lloyd, supra*, "meaningful administrative enforcement" is available for complaints under section 504. HEW must be given at least the opportunity to develop an efficient and sensitive mechanism to deal with complaints of discrimination brought by handicapped persons before a court can make a reasoned evaluation of such a mechanism's adequacy. Especially in the context of a relatively new and broadly-worded statute like the one in question here, which could flood the courts with new litigation, administrative interpretation and guidance may be an important element in the developing construction and application of the law. . . . Further, it is not unreasonable to conclude that HEW could bring a greater degree of flexibility and expertise to bear on these issues.

Another decision, *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977), has also held that the "primary jurisdiction" doctrine is appropriate for grievances under section 504 of the Act. In *Crawford*, the plaintiff was a deaf-handicapped graduate student who claimed the university failed to provide him with interpreter services. The court in *Crawford* concluded that under the HEW regulations:

> [A]ny person believing himself to be the object of discrimination can file a complaint (45 C.F.R. § 80.7). An investigation can be commenced and a hearing may be obtained. While a complainant may not be a party to the proceeding, he can petition to become involved in the controversy as amicus curiae. (45 C.F.R. § 81.23).

440 F. Supp. at 1058. *See Barnes v. Converse College*, No. 77-1116 (D.S.C., order filed Mar. 28, 1978), *appeal docketed*, No. 78-1440 (4th Cir. July 19, 1978).

This authority may presage the required result in this case, whether resort is made to the doctrines of exhaustion of administrative remedies or primary jurisdiction. *See Nader v. Allegheny Airlines*, 426 U.S. 290 (1976); *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 3142 (1978).

CONCLUSION

The amici curiae are in full agreement with the remarks of one sage commentator who recently stated:

> No one can quarrel with a goal of full access and participation by handicapped citizens in the life and affairs of this nation, but questions are legitimately raised as to who can and should bear the costs inherent in serving that goal.

Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse College*, 29 Mercer L. Rev. 745, 745-46 (1978).

At a time when all beneficiaries of federal aid, including the amici, are vitally in need of guidance regarding their necessary responsibilities under the Rehabilitation Act, this case raises these key questions and a host of others on the scope and meaning of this important federal statute. This Court's determination of those urgent questions of federal law is worthy of the most serious consideration. For these reasons and those expressed throughout this brief, the undersigned amici curiae strongly urge review by this Court of the divided decision of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington D.C. 20036
Attorney for the American
Council on Education

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the
Commonwealth of Massachusetts

GERALD GORNISH
Attorney General of Pennsylvania
Capitol Annex, Room 1
Harrisburg, Pennsylvania 17120
Attorney for the
Commonwealth of Pennsylvania

J. MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

AVRUM GROSS
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Attorney for the
State of Alaska

JOHN A. LaSOTA, JR.
Attorney General of Arizona
200 State Capitol Building
Phoenix, Arizona 85007
Attorney for the
State of Arizona

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the
State of Connecticut

RICHARD R. WIER, JR.
Attorney General of Delaware
Wilmington Tower Bldg.—4th Floor
Wilmington, Delaware 19801
Attorney for the
State of Delaware

ROBERT L. SHEVIN
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304
Attorney for the
State of Florida

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for the
State of Georgia

RONALD Y. AMEMIYA
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813
Attorney for the
State of Hawaii

WAYNE L. KIDWELL
Attorney General of Idaho
State Capitol
Boise, Idaho 83720
Attorney for the
State of Idaho

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
State Capitol, P.O. Box 44005
Baton Rouge, Louisiana 70804
Attorney for the
State of Louisiana

FRANCIS B. BURCH
Attorney General of Maryland
1400 One South Calvert Building
Baltimore, Maryland 21202
Attorney for the
State of Maryland

A. F. SUMMER
Attorney General of Mississippi
Carroll Gartin Justice Building
Jackson, Mississippi 39205
Attorney for the
State of Mississippi

JOHN D. ASHCROFT
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
Attorney for the
State of Missouri

MICHAEL T. GREELY
Attorney General of Montana
State Capitol
Helena, Montana 59601
Attorney for the
State of Montana

PAUL L. DOUGLAS
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509
Attorney for the
State of Nebraska

THOMAS D. RATH
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
Attorney for the
State of New Hampshire

JOHN J. DEGNAN
Attorney General of New Jersey
State House Annex, Second Floor
Trenton, New Jersey 08625
Attorney for the
State of New Jersey

LOUIS J. LEFKOWITZ
Attorney General of New York
#2 World Trade Center
New York, New York 10047
Attorney for the
State of New York

RUFUS L. EDMISTEN
Attorney General of North Carolina
Justice Building, P.O. Box 629
Raleigh, North Carolina 27602
Attorney for the
State of North Carolina

WILLIAM J. BROWN
Attorney General of Ohio
State Office Tower, 30 E. Broad St.
Columbus, Ohio 43215
Attorney for the
State of Ohio

JAMES A. REDDEN
Attorney General of Oregon
100 State Office Building
Salem, Oregon 97310
Attorney for the
State of Oregon

DANIEL R. McLEOD
Attorney General of South Carolina
Hampton Office Building
Columbia, South Carolina 29211
Attorney for the
State of South Carolina

WILLIAM M. LEECH, JR.
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
Attorney for the
State of Tennessee

SLADE GORTON
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504
Attorney for the
State of Washington

CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia
State Capitol
Charleston, West Virginia 25305
Attorney for the
State of West Virginia

Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 27, 1978
CERTIORARI GRANTED JANUARY 8, 1979

IN THE
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Nov. 5, 1975	Answer filed.
Oct. 18, 1976	Motion to amend complaint filed.
Oct. 18, 1976	Trial before District Court.
Dec. 27, 1976	District Court's findings of fact and conclusions of law filed (dated Dec. 22, 1976).
Jan. 5, 1977	Notice of appeal filed.
March 28, 1978	Judgment and opinion of Fourth Circuit entered.
June 29, 1978	Petition for rehearing and suggestion for rehearing en banc denied.
Oct. 27, 1978	Petition for writ of certiorari filed.
Jan. 8, 1979	Order of Supreme Court granting certiorari.

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NORTH CAROLINA

Fayetteville Division

FRANCES B DAVIS,	)	
Plaintiff	)	
Vs.	)	COMPLAINT
SOUTHEASTERN COMMUNITY		75-0041-Civ-3
Defendant		

Now comes the Plaintiff before the Court and complaining of the Defendant, says and alleges:

PARAGRAPH ONE

The Plaintiff is a citizen and resident of Robeson County, North Carolina.

PARAGRAPH TWO

The Defendant is a tax-supported public educational institution created and existing by the Legislature of the State of North Carolina and operating by and through a duly appointed and qualified Board of Trustees as authorized by the General Statutes of the State of North Carolina, and maintaining its principal place of business in Columbus County, North Carolina.

PARAGRAPH THREE

That the Plaintiff is a duly qualified Licensed Practical Nurse, having been granted such professional license by the State of North Carolina in 1967, which license is currently in good standing. Further, the Plaintiff is presently actively engaged and employed in the professional nursing practice pursuant to and as an exercise of the privilege granted by such license.

PARAGRAPH FOUR

That the Defendant Institution is a State-supported Community College offering educational benefits to residents of the several counties surrounding Columbus County, North Carolina in various fields of vocational and professional instruction. That among the educational programs so offered by the Defendant Institution is an Associate Degree Nursing Program.

PARAGRAPH FIVE

That during the year 1973, the Plaintiff made application unto the said Defendant Institution for admission as a student during the 1973-74 School Term, preparatory to entering the Associate Degree Nursing Program in September, 1974. Plaintiff was accepted as a student for 1973-74, with her progress in general educational courses to be evaluated during the said school year to determine her eligability for acceptance into the Nursing Degree Program.

PARAGRAPH SIX

That pursuant to such acceptance, the Plaintiff regularly attended classroom instruction, accomplished all work assigned to her, and successfully completed her schedule of classes for the 1973-74 school term.

PARAGRAPH SEVEN

That for many years the Plaintiff has had a bilateral moderately severe sensorineural hearing loss, which has been improved to within the outer limits of normal hearing levels by the use of a hearing aid specially prescribed and custom fitted to her.

PARAGRAPH EIGHT

That such auditory condition existed prior to and at the time Plaintiff was trained and licensed as a "Licensed Practical Nurse," during the numerous years which she has been actively engaged in the practice of the nursing profession, and at the time Plaintiff made application for admission to the Defendant Institution. That the Plaintiff made full and complete disclosure of such condition unto the Defendant Institution by including such information within her written and oral applications for admission as a student in the Nursing Program.

PARAGRAPH NINE

That during the school year 1973-74, and at such a time when the Plaintiff was maintaining satisfactory grade levels, the Defendant Institution advised the Plaintiff that it was giving further consideration to her application for admission into the Associate Nursing Degree Program, such re-evaluation being based solely upon her auditory condition.

PARAGRAPH TEN

That pursuant thereto, and in accordance with specific instructions by the Defendant Institution, Plaintiff took various medical tests and provided Defendant with numer-

ous letters explaining her condition, all of which reflected Plaintiff's hearing capability to be within the outer limits of normal, and further reflected Plaintiff adequately performed the professional duties as a Licensed Practical Nurse.

PARAGRAPH ELEVEN

That in spite of such a showing of capabilities by the Plaintiff as to personal and professional competence, the Defendant arbitrarily and capriciously, and acting in a discriminatory manner toward the Plaintiff, denied the Plaintiff admission to further educational programs as a candidate for the Associate Nursing Degree. Such denial was based solely upon Defendant's prejudice toward the auditory condition of the Plaintiff.

PARAGRAPH TWELVE

That the educational benefits denied to this Plaintiff by the discriminatory action of the Defendant Institution were rights, privileges and immunities secured to her by the Constitution and by the Law of the United States of America, and constitute a denial of equal protection under the law, and could not be withheld from her without due process of law.

PARAGRAPH THIRTEEN

That the rejection and termination of Plaintiff from the Associate Degree Nursing Program was accomplished by the Defendant Institution pursuant to, and under color of law of the State of North Carolina, and in violation and contrary to rights of the Plaintiff protected by the Constitution and the Laws of the United States, thereby giving rise to an action on behalf of this Plaintiff under 42 USC Section 1893.

PARAGRAPH FOURTEEN

That the Defendant Institution effected the discriminatory practice upon this Plaintiff in that:

(1) Qualifications of applicants for admission to Community Colleges are established by the State Board of Education pursuant to authority granted unto them by N.C.G.S. 115A-5, and application of such standards is delegated by N.C.G.S. 115A-(4) unto the Board of Trustees of the several community colleges, including this Defendant Institution.

Pursuant to such exercise of delegated authority, the Defendant Institution applied such statutory power in an aribtrary manner so as unlawfully exclude this Plaintiff from further educational benefits.

(2) Further, the Defendant Institution invoked provisions of N.C.G.S. 90, Article 9, entitled "NURSE PRACTICE ACT," in that the Defendant Institution intimated that even if Plaintiff successfully completed educational requirements, she could not be licensed as "Registered Nurse" because of her physical handicap. That such statements were false and deceitful and the untruthfulness of same was known unto the Defendant Institution in that said Defendant Institution full well knew the Plaintiff was already licensed as a "LICENSED PRACTICAL NURSE" by the North Carolina Board of Nursing and that the statutory requirements touching upon physical competency to practice nursing are the same

for both "Licensed Practical Nurses" and "Registered Nurses."

PARAGRAPH FIFTEEN

That the discriminatory practices perpetrated upon this Plaintiff, as hereinbefore alleged, were conducted by agents and employees of the Defendant Institution acting within the scope of their employment as designated and directed by the Board of Trustees pursuant to their statutory authority.

PARAGRAPH SIXTEEN

That the wrongful actions of the Defendant Institution have caused Plaintiff to expend a great deal of time, effort and money to comply with the Defendant's requests for tests, evaluations, documents and letters of reference, and to attend numerous meetings and conferences. That such wrongful action on the part of the Defendant Institution has caused the Plaintiff to suffer extreme and painful mental anguish and stress. That Plaintiff has been damaged by the wrongful actions of the Defendant Institution in the amount of Twenty Thousand and No/100 ($20,000.00) Dollars.

WHEREFORE, the Plaintiff prays that the Court:

(1) Order the Defendant Institution to enroll and admit Plaintiff as a student and candidate in the Associate Degree Nursing Program, and to bestow upon Plaintiff all privileges attendant thereto.

(2) Allow the Plaintiff to have and recover damages of the Defendant Institution in the amount of

Twenty Thousand And No/100 ($20,000.00) dollars.

(3) Tax all costs sgainst the Defendant Institution.

(4) Grant such other and further relief as to this Court shall seem just and proper.

MOSES & DIEHL

By: /s/Philip A. Diehl
Philip A. Diehl
Attorney for the Plaintiff
127 West Edinborough Avenue
Post Office Box 688
Raeford, North Carolina 28376
Telephone: (919) 875-3379

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

[Caption omitted in printing]

MOTION TO AMEND COMPLAINT

ALLOWED IN OPEN COURT ON DATE OF TRIAL, WITHOUT OBJECTION

Now comes the Plaintiff, through counsel, and does hereby pray that the Court allow the Plaintiff to amend PARAGRAPH THIRTEEN of the Complaint by the addition of the following language and allegation:

That further, jurisdiction lies with the United States District Court under and by virtue of the terms and provisions of 28 USC SEC. 1337:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

The foregoing language is to be in addition to and not in place of that language already contained in PARAGRAPH THIRTEEN of the Complaint.

WHEREFORE, the Plaintiff prays that the Court allow the amendment of the Complaint to incorporate the foregoing language and allegation into PARAGRAPH THIRTEEN.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

[Caption omitted in printing]

ANSWER

The defendant, answering the Complaint filed herein, says:

FIRST DEFENSE:

The Complaint fails to allege sufficient facts upon which relief can be granted and motion in thereupon made for a dismissal of the action.

SECOND DEFENSE:

The Complaint fails to allege sufficient facts to raise a federal question which would give the Federal Court jurisdiction over the matter or person of the Defendant, and motion is thereupon made for a dismissal of the action.

THIRD DEFENSE:

That Plaintiff has failed to exhaust the remedies available to her in the State courts and administrative remedies provided by the Defendant Institution, and motion to dismiss is thereupon made.

FOURTH DEFENSE:

1. Defendant admits paragraph one.
2. The Defendant admits paragraph two.
3. The Defendant does not have sufficient knowledge or information with which to answer paragraph three and the allegations therein are denied.
4. Paragraph four is admitted.

5. Answering paragraph five, it is admitted that Plaintiff made application as a student during the year 1973. Except as admitted, all other allegations therein are denied. By way of further answer, Defendant says that Plaintiff had a serious hearing difficulty detected early in April, 1973, and was accepted as a college student to take general college work. The evaluation of said Plaintiff for further study was made upon her academic work as well as physical eligibility and other related matters. It is specifically denied that she was admitted preparatory to entering the Associate Degree Nursing Program.
6. Answering paragraph six, it is admitted that Plaintiff regularly attended classroom instruction and did work assigned to her. Further answering said paragraph, however, Defendant says that Plaintiff's hearing defect was a noticeable problem in her classroom experience.
7. Paragraph seven is denied. Answering said paragraph, Defendant says that Plaintiff did not possess normal hearing but with a hearing aide on her right side and her ability to read lips, she was able to communicate with other people. Her impairment was a bilateral, sensori-nueral hearing loss with a moderately severe loss on the right ear and a severe hearing loss on the left ear. In addition, she had a speech discrimination loss which factors made Plaintiff unacceptable as a candidate for the Associate Degree Nursing Program.

8. Answering paragraph eight, the Defendant does not have sufficient knowledge or information with respect to Plaintiff's auditory condition prior to being licensed as a Practical Nurse and said allegations are, therefore, denied. It is further denied that Plaintiff made full and complete disclosure of her condition to the College in connection with her application for admission. By way of further answer, Defendant says that no statements appear on Plain-

tiff's application for admission made in March, 1973, nor any references to same and that her hearing impairment was discovered and ascertained from observations and references after she commenced her classroom work. Except as admitted, all other allegations are denied.

9. Paragraph nine is denied. Further answering same, Defendant says that the whole condition of a student, mentally and physically, are taken into account in determining her capacity and eligibility for special training and that Plaintiff was not a capable and eligible candidate. That her condition was studied and evaluated by an audiologist at Duke Hospital and the medical reports were studied and evaluated by the North Carolina Board of Nursing and her eligibility for the Associate Degree Nursing Program was not determined subjectively or arbitrarily by the College but from a composite of expert study, examination and evaluation.

10. Answering paragraph ten, it is admitted that Plaintiff took various medical tests with respect to her hearing impairment. Except as admitted the other allegations therein are denied. Further answering same, Defendant says that all medical tests and evaluations performed with respect to Plaintiff ascertained her inability and incapacity to serve in the nursing program and, therefore, ineligible as a candidate for admission.

11. Paragraph eleven is untrue and denied. By way of further answer thereto, the Defendant says the exhaustive efforts were made to determine Plaintiff's eligibility for admission to the Associate Degree Nursing Program and all such tests proved her unfitness and inability therefor and that the Defendant did not act in an arbitrary or capricious manner nor was it discriminatory or prejudice toward the auditory condition of the Plaintiff.

12. Paragraph 12 is denied. Further answering same, the Defendant says no federal question is raised for that there is no constitutional requirement for admission to the Associate Degree Nursing Program, but the eligibility of candidates therefor are determined objectively and equally upon their academic, mental and physical capabilities. No constitutional rights, therefore, are either infringed or abused and no privileges or immunities denied the Plaintiff.

13. Paragraph 13 is denied.

14. Paragraph 14 and each sub-section thereunder (1) and (2) are untrue and denied. Further answering same, Defendant says that N.C.G.S. 115A-5 provides for the administration of state institutions by the State Board of Education and N.C.G.S. 115A-4 provides for the establishment and transfer of institutions and that nothing in either of said statutory provisions is material or relevant to Plaintiff's alleged claim for that the Defendant was acting lawfully and properly in the exercise of its lawful and statutory duty and responsibility to carry out properly its Associate Degree Nursing Program and no rule or regulation pertaining thereto was either discriminatory or prejudicial to the Plaintiff. Further answering same, the said Plaintiff was not excluded by the Defendant institution from further educational benefits but was offered further opportunity in fields of endeavor for which she was qualified.

15. Paragraph fifteen is denied.

16. Paragraph sixteen is denied.

WHEREFORE, Defendant demands judgment that the Plaintiff's Complaint be dismissed, that it recover its cost

in this action, and that it be granted any and all other relief to which it may appear to be entitled.

WILLIAMSON & WALTON
Attorneys for Southeastern Community College
By: /s/Walt P. Williamson
136 Wshington Street
Whiteville, North Carolina 28472
Telephone (919) 642-7151/7152

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION
CIVIL ACTION NO. 75-0041-Civ-3

[Caption omitted in printing]

ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of the Rules of Federal Civil Procedure, a Final Pre-Trial Conference was held in the above entitled cause on the 22nd day of September and the 7th day of October, 1976.

I

It is stipulated and agreed between the parties that the Plaintiff is a citizen and resident of Robeson County, North Carolina, and the Defendant is a tax supported public educational institution created and existing by the Legislature of the State of North Carolina, and operating by and through the duly appointed and qualified Board of Trustees, and maintaining its principal place of business in Columbus County, North Carolina.

II. The Basis for JURISDICTION In This Matter Is Contested.

PLAINTIFF'S CONTENTIONS

Plaintiff contends jurisdiction of this matter is based upon a violation of 29 U.S.C. 794 and a denial of equal protection of the laws actionable under 42 U.S.C. Section 1983.

DEFENDANT'S CONTENTIONS

1. Defendant contends no constitutional question has been raised under 14 U.S.C. Section 1983 in that admission to an academic program (associate degree in nursing) is not a property right protected by the Constitution.

2. Defendant contends that Plaintiff failed to exhaust the remedies available to her in the State Courts and the Administrative Remedies provided by the Defendant Institution.

3. Defendant contends that the standards and objectives established by the College for admission to Associate Degree Nursing Program were provided to the Plaintiff and other students and were fairly and uniformly administered, and

4. Defendant institution did not act arbitrarily or capriciously toward the Plaintiff but denied her admission to the Associate Degree Nursing Program because of a severe hearing impairment which was provided for in the selection process.

III

There are no motions pending except as deal with the jurisdictional questions.

IV. SUMMARY OF ULTIMATE FACTS CLAIMED BY:

PLAINTIFF'S CONTENTIONS –

The Plaintiff contends she was a Licensed Practical Nurse who enrolled as a student at Southeastern Community College preparatory to entering the Associate Nursing Degree Program offered by the college. She further contends that she has suffered a bilateral moderately severe sensorineural hearing loss for many years, which has been improved to within the outer limits of normal hearing levels by the use of a hearing aid specifically prescribed and custom fitted to her. The Plaintiff further contends that she was arbitrarily denied admission to the Defendants' Associate Nursing Degree Program by virtue of her handicap, when in fact her hearing loss would not preclude her from successfully completing the educational program offered by the Defendant College.

DEFENDANT'S CONTENTIONS –

The Defendant contends that the Plaintiff had a congenital hearing loss on both ears for many years and that she suffered a significant hearing loss with a better understanding of speech on her right ear than her left ear. That the Plaintiff wore a hearing aid because of the significant bilateral hearing loss; that her hearing loss was associated with a marked speech discrimination loss and that she relied upon lip reading as well as amplified sound. That the hearing loss of the Plaintiff made her unacceptable in the Associate Nursing Degree Program and that the rejection of her application was a logical exercise of the authority of the college to control the admission of students into various programs offered by the college.

V. STIPULATION OF FACTS

1. The Plaintiff is a citizen and resident of Robeson County, North Carolina.

2. The Defendant is a tax supported Public Educational Institution created and existing by the Legislature of the State of North Carolina and operating by and through a duly appointed and qualified Board of Trustees, as authorized by the General Statutes of the State of North Carolina, and maintaining its principal place of business in Columbus County, North Carolina.

3. The Plaintiff is a duly qualified Licensed Practical Nurse, having been granted such professional license by the state of North Carolina in 1967, and which license is currently in good standing. Further, the Plaintiff has from time to time been actively engaged and employed in the exercise of the privilege granted to her as a licensed practical nurse.

4. The Defendant Institution is a State supported Community College offering educational benefits to residents of the several counties surrounding Columbus County, North Carolina, in various fields of vocational and professional instruction. That the Plaintiff resides in one of the counties served by the Defendant College. That further, among the educational programs offered by the Defendant Institution is an Associate Degree in Nursing.

5. The Defendant institution receives various forms of Federal financial assistance.

6. That during 1973, the Plaintiff made application to the Defendant Institution for admission as a student in 1973-74 school term preparatory to entering the Associate Degree Nursing Program in September, 1974.

7. The Plaintiff successfully completed her schedule of classes for the 1973-74 school term.

8. That because of a hearing impairment, the Plaintiff was denied admission into the Associate Degree Program by the Defendant Institution.

9. That prior to August 8, 1974, the Plaintiff met with several members of the College faculty and administration including the Dean for Student Development, Dan W. Moore, and Dr. W. R. McCarter, President of the College, in an effort to obtain a reversal of the earlier decision denying her admission into the Associate Degree Nursing Program. That such meeting resulted in the letter of August 8, 1974 from Dean Dan W. Moore advising the Plaintiff that the College would not reconsider her application.

VI. EXHIBITS

The following is a list of all the known exhibits of the Plaintiff and Defendant to be offered in the trial:

* * *

VII. THE PLAINTIFF MAY CALL THE FOLLOWING WITNESSES TO TESTIFY:

* * *

VIII. THE DEFENDANT MAY CALL THE FOLLOWING WITNESSES TO TESTIFY:

* * *

IX.

It is stipulated that trial by jury was not desired or demanded by either party, and the case is ready for trial on the non-jury docket.

X.

It is stipulated there are no other actions presently pending in this or any other Court that involve common questions of law and are presently known to either of the parties.

XI.

It is stipulated and agreed that the contested issues of fact are:

PLAINTIFF CONTENDS –

1. Was the Plaintiff eligible for admission as a student in the Associate Nursing Degree Program of Southeastern Community College in view of her hearing impediment?

2. If so, did the Defendant discriminate unlawfully against the Plaintiff in denying her admission?

3. Is the Plaintiff entitled to injunctive relief against the Defendant by virtue of such discrimination?

4. Is the Plaintiff entitled to recover damages from the Defendant Institution by reason of such discrimination?

5. How much, if anything, is the Plaintiff entitled to recover by way of such damages?

DEFENDANT CONTENDS –

1. Does the Complaint allege sufficient facts upon which a constitutional question is presented?

2. Did the Plaintiff exhaust the administrative remedies provided by Defendant institution upon being denied admission to the Associate Degree Nursing Program?

3. Did the Admission Criteria for Associate Degree Nursing Program unfairly and unlawfully discriminate against the Plaintiff in the denial of her admission?

4. Did the Defendant institution act in an arbitrary, capricious or discriminatory manner toward the Plaintiff in denying her admission to the Associate Degree Nursing Program?

5. If so, is the Plaintiff entitled to admission to the Associate Degree Nursing Program?

6. What amount of damages, if any, is the Plaintiff entitled to recover of the Defendant institution?

XII.

The contested issues of law to be tried by the Court are:

PLAINTIFF CONTENDS –

PLAINTIFF'S CONTENTIONS

1. Are the provisions of 29 U.S.C. Section 794 applicable, and, if so, has the Defendant Institution unlawfully discriminated against the Plaintiff?

2. Did the Defendant Institution deny the Plaintiff equal protection of the laws in denying her admission to the Associate Degree Nursing Program?

3. Did the Defendant Institution act under color of state law in the denial of admission to the Plaintiff?

DEFENDANT CONTENDS

DEFENDANT'S CONTENTIONS

1. Are the allegations in Plaintiff's Complaint sufficient to present a constitutional question?

2. If so, did the Plaintiff fail to exhaust her administrative remedies provided by the Defendant Institution?

3. Does the Plaintiff have a property right in the admission to the academic program of Defendant institution guaranteed by the Constitution?

4. Was the Plaintiff denied equal protection of the laws under the Fourteenth Amendment in respect to her appllcation for admission to an academic program and denial of admission by Defendant institution?

5. Was the denial of Plaintiff's admission to the Associate Degree Nursing Program by Defendant institution arbitrary and discriminatory?

6. If so, is the Plaintiff entitled to admission to the Associate Degree Nursing Program of the Defendant institution?

7. What amount of damages, if any, if Plaintiff entitled to recover of Defendant institution?

XIII.

Counsel for the parties have discussed settlement, and prospects of same appear to be remote. Counsel agree to notify the Clerk of Court in the event of any material change in settlement prospects.

XIV.

Counsel for the parties announce that all witnesses are available for trial and the case is in all respects ready for trial. The probable length of trial is estimated to be between one (1) and two (2) days.

This final pre-trial order, when signed by counsel for the parties, and approved by the Court, together with any memorandum hereinafter entered by agreement of the parties and accepted by the Court, shall constitute the final pre-trial order, and will control the subsequent course of the action unless modified by consent of the parties and the court, or by an order of the Court, to prevent manifest injustice.

/s/Philip A. Diehl
Philip A. Diehl
Attorney for the Plaintiff
Moses, Diehl & Pate
Attorneys at Law
Post Office Drawer 688
Raeford, North Carolina 28376
Telephone: (919) 865-3379

/s/Edward L. Williamson
Attorney for the Defendant
Williamson & Walton
Attorneys at Law
136 Washington Street
Whiteville, North Carolina 28472
Telephone: (919) 642-7151

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

[Caption omitted in printing]

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This is an action brought by plaintiff under the provisions of 42 U.S.C. §1983 alleging that the defendant institution denied plaintiff equal protection of the law and due process in denying her admission to the Associate Degree Nursing Program of defendant institution, and under 28 U.S.C. §794 alleging that plaintiff was discriminated against by the defendant institution in denying her admission because of a hearing disability. After hearing and considering the testimony adduced at trial, and considering the various pleadings, exhibits, and submissions taken into evidence, including a review of the court's notes taken at the time of trial, upon the credible evidence presented, the court publishes the following:

FINDINGS OF FACT

1. The court has jurisdiction of the subject matter of this claim pursuant to 28 U.S.C. §1343(3).

* * *

[Remainder reprinted in full in Pet. App. 12a.]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

FRANCES B. DAVIS,
Plaintiff,

v.

CIVIL ACTION NO.
75-0041-CIV-3

SOUTHEASTERN COMMUNITY COLLEGE,
Defendant.

NOTICE OF APPEAL

Now comes the Plaintiff, through Counsel, and in accordance with the Rules of Federal Procedure, does by these presents give notice of appeal from the findings of fact, conclusions of law, and judgment rendered herein to the United States Court of Appeals for the Fourth Circuit.

This the 5th day of January, 1977.

MOSES, DIEHL & PATE
ATTORNEYS FOR THE PLAINTIFF

By: /s/ Philip A. Diehl
Philip A. Diehl
Post Office Drawer 688
127 West Edinborough Avenue
Raeford, North Carolina 28376
Telephone: (919) 875-2137

[Filed Jan. 6, 1977]

TRANSCRIPT

APPEARANCES AT TRIAL

For the Plaintiff – Philip A. Diehl, Esq.
Warren L. Pate, Esq.
Moses, Diehl & Pate
Attorneys at Law
P.O. Box 688
Raeford, North Carolina 28376

For the Defendant–Edward L. Williamson, Esq.
Benton H. Walton, III, Esq.
Williamson & Walton
Attorneys at Law
136 Washington Street
Whiteville, North Carolina 28472

BEFORE THE HON. ROBERT W. HEMPHILL, United States District Judge

This case was called for trial on the 18th day of October, 1976 at the United States District Court for the Eastern District of North Carolina at Fayetteville, North Carolina.

Plaintiff opened her evidence with the admission of Plaintiff's Trial Exhibits 1 through 20, and upon the acceptance of same by the Court, Plaintiff rested.

Defendant moved for dismissal, which motion was taken under advisement by the Court and dealt with in the opinion.

Defendant introduced into evidence, and the Court admitted, Defendant's Trial Exhibits 1 through 3. The Defendant then offered the testimony of several witnesses.

* * *

8 ANNIE ODUM HAYES,

was called as a witness by and on behalf of the Defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. Would you, please, state your name for the Court?
A. It's Annie Odum, but it's Hayes now.

9 Q. You have remarried since you were at Southeastern?
A. That's right.

Q. You are now Annie Odum Hayes? A. Right.

Q. Do you know the Plaintiff, Mrs. Frances Davis?
A. Yes.

Q. Did you have an occasion back in Marsh of 1974 to have any type of conversation or contact with her?
A. On March 18, 1974, I did a pre-admission interview with Mrs. Davis.

Q. Miss Odum, at that time were you associated with Southeastern Community College? A. Yes, I was.

Q. In what capacity? A. I had lead responsibility for teaching the maternal health nursing and the psychiatric health nursing.

Q. And how long had you been with the college at that time? A. Since August 1, 1969.

Q. Did you know Mrs. Davis prior to that time?
A. No, I didn't.

Q. Did you know that she had been a student there at Southeastern Community College during the preceding year, that is during the academic year 1973-1974? A. Yes, I did.

10 Q. Now Miss Odum, did you have an opportunity to review the application for admission of Mrs. Davis to the Associate Degree of Nursing program at the college?

A. Are you asking me whether I had like looked through the folder and had information about, you know, the grades and this sort of thing?

Q. Yes. Was part of your responsibility at that time to interview applicants for this nursing program? A. Yes, it was.

Q. And did you interview other applicants besides Mrs. Davis? A. Yes, I did.

Q. Now what did the interview with Mrs. Davis consist of? A. We had a form in which we went by so that the interviews would be uniform and I believe there is probably a copy of this, and we used this with each applicant who came in seeking admission to the Associate Degree Nursing program. In fact, this was worked up over a period of years with a lot of work and input from the faculty as well as the student personnel services people and whenever an applicant came in, of course, we had this form to go by and some of the things that we looked at when we talked to the person was things other than, of course, the admissions group looked at grades while we were there, but

11 that was not the object of this. We had a personal interview with the person and made some estimate of suitability for doing the nursing, particularly, the clinical students.

Q. Mrs. Hayes, I hand you what has already been identified and introduced as Defendant's Exhibit 24 and I will ask you if you would, to look at that and tell me whether or not that is the overall estimate of suitability for the associate degree of nursing program, which you made as a result of your interview with Mrs. Davis? A. That is right.

Q. You have a copy of that? A. I have a copy of that.

Q. Would you relate to the court, please, Ma'am, the areas in which you made the estimate for suitability for

the ABN program? A. Communications is one big area, the ability to communicate to the patient as well as other members of the health team and as a part of this interview I did note that Mrs. Davis had a hearing difficulty. During the course of our conversation I knew it was necessary for me to repeat questions to her at least on two occasions.

Q. At that time – A. She had difficulty hearing me just on close together or one to one.

12 Q. Did you have before you her records at the college, her application for admission and other records? A. I had her application for admission but I did not have a copy of any previous interview or anything, so I did not know that she had a hearing difficulty until I talked to her that day.

Q. How did you notice that she did have a hearing difficulty and what, if any, particular recognition did you make of her problem at that time? A. Well, she told me that she had a hearing difficulty and that she wore a hearing aid and we talked about that, and I mentioned, I made a comment to her that, you know, the fact that I had had to repeat to her I thought it would be difficult for patients attempting to communicate with her.

Q. Do you know of your own knowledge how many applicants there were that particular year for admission to this program?

MR. DIEHL: Objection?

A. I don't know the exact number.

THE COURT: What's the grounds of the objection? Suppose she knew?

MR. DIEHL: All right, Your Honor.

THE COURT: She said she didn't know, but suppose she knew. Go ahead.

13 Q. You said you did not know? A. I knew that there were quite a few, but I don't know how many.

Q. Do you know, approximately, how many people that you interviewed for the program that year, Mrs. Hayes? A. I do not remember the exact number of people that I interviewed, but I know it was several. We took turns, you know, we had so many days or so many hours designated as office hours and then the secretary simply made appointments for us during that time and the whole staff took, you know, had an opportunity to interview people during this time.

Q. Mrs. Hayes, did you teach in the Associate Degree Nursing Program? A. Yes, I did.

Q. Was there an academic or classroom phase and also a clinical phase? A. Yes.

Q. What did the problem that you observed about Mrs. Davis' hearing, what did that suggest to you as a problem that would be in her training program? A. Well, I believe Mrs. Davis told me that she did depend on lip reading to assist her and I think one of the times we were talking I was not looking directly at her when we were talking and I did repeat what I said. I had a responsibility

14 for the maternal nursing and, of course, some of the time, particularly, in the labor and delivery rooms you have to wear a mask and I did not think – I thought she would have difficulty in attempting to do that part of the clinical.

The other area in which I had a lead responsibility in was the psychiatric mental health and, of course, the communication is the basic thing there, too, the interaction between the nurse and the patient.

Q. And it was upon these observations that you did not recommend her for the ADN program? A. That's right. I discussed it with her that day as a matter of fact.

Q. The final selection process, that is whether she was admitted or not admitted, was not your responsibility?

A. No, it was not and this was just one part of the selection process.

MR. WILLIAMSON: Thank you.

CROSS EXAMINATION

By Mr. Diehl:

Q. Mrs. Hayes, in the interview that you set forth with Mrs. Davis, that took place on March 18, 1974; is that correct? A. That's correct.

Q. Mrs. Davis had been enrolled as a student in Southeastern Community College for the 1973-74 academic school year; is that also correct? A. As far as I remember. I didn't always have access to how long the person had been there when I did this interview.

Q. You did have access to her application, however; did you not? A. I had access to her application but I had not seen – the day I interviewed her I had not seen previous interviews or information pertaining to her.

Q. Did the access to the records of her application include the medical records? A. I don't remember seeing medical records that day.

Q. You, however, knew of your own knowledge that Mrs. Davis had a hearing impairment; did you not? A. I do not recall that I knew until I talked with Mrs. Davis that day and she told me that she had some hearing difficulty and wore a hearing aid.

Q. Had you had any conversations with either Mrs. Riggio or Mrs. Ashley prior to that date about Mrs. Davis' hearing impairment? A. I had not talked with Mrs. Ashley and I had not read her report.

Q. And what about Mrs. Riggio? A. I had talked with Mrs. Riggio, but it was simply in reference to the interviewing process and we did not discuss Mrs. Davis.

Q. Now Mrs. Hayes, at the time that you conducted this interview, you, yourself, were involved in the teaching program for the ADN degree; is that correct? A. That's correct.

Q. Now from your direct testimony, do I understand that you foresaw problems primarily in a clinical area of

training? A. That was the basis for my, what I wrote on this report.

Q. And Mrs. Hayes, in the clinical aspects of training under the ADN program, is it not required that the student work under the direct supervision of an instructor? A. Not under the direct supervision a hundred percent of the time. For instance, you would have more than one student in the clinical area.

Q. But the students would at the same time be under the overall supervision of an instructor; is that correct? A. Under the overall supervision, yes, but one of the important things that we have to do in working with students is to determine whether they are safe as far as the practicing the nursing skills and so on when we are not in the room as well as while we are directly involved with the supervision.

Q. Are you saying then that Frances Davis then would have required additional supervision from the other students in the clinical portion? A. No, I think that she would have required more supervision from the instructor.

Q. In other words, there would have been more supervision required because of her hearing impairment than he would give to an ordinary student who did not have such a handicap? A. I would think that. I would also question her ability to function in the area that I mentioned as far as in the delivery and labor rooms when you wear a mask and sometimes it is difficult to hear even without a hearing aid or hearing thing.

Q. Now you were also concerned as to whether or not she would work as a registered work; is that correct? A. As a part of this interview I also noticed that she really did not have – she was a little vague about, you know, what she was going to do because she was currently not working as a nurse and that was another thing that I made a notation about when I did the interview.

Q. You knew she was a licensed practical nurse?
A. Yes, I did.

Q. Are you an RN or LPN? A. I'm a registered nurse.

Q. Registered nurse. Now Mrs. Hayes, the distinction
18 between the requirements for a licensed practical nurse and a registered nurse are in the amount of theory and training only; is that correct, as far as licensing qualifications? A. It has to do with theory and training, yes.

Q. And as far as the phsyical qualifications, Mrs. Davis was at the time of your interview and had for several years prior to that time been licensed as a practical nurse?
A. However, she stated she had not worked as a licensed practical nurse except to do a little bit of private duty and was not currently working.

Q. At that time I believe she told you she was involved in the operation of a family dry cleaning business because of some illnesses; is that correct? A. Yes, she did say she was helping with her family business.

Q. Now Mrs. Hayes, you have no reason to believe by virtue of your interview that Mrs. Davis was unable to complete the educational levels necessary for the ADN program; do you? A. No, I didn't have any reason to believe she would be unable to do that.

Q. And the basis for your decision or your evaluation that she should not be accepted was because of her hearing
19 impairment and the difficulty it might give in her being licensed as an RN; is that correct? A. That is correct.

MR. DIEHL: No other questions.

REDIRECT EXAMINATION

By Mr. Williamson:

Q. Mrs. Hayes, what is the difference, the practical differences in duties to be performed by a registered nurse and those that would be performed by an LPN?

MR. DIEHL: If your Honor, please, at this time the Plaintiff would object. The basis of this suit is not whether or not the Plaintiff could practice as a registered nurse but whether or not she is entitled to the educational programs offered by the college which are two different things.

THE COURT: Didn't you ask her about that?

MR. DIEHL: I asked her about the physical qualifications or the – the qualifications, if Your Honor, please, in dealing with the throy for the licensing of an RN and an LPN. But I never got involved with the actual practice of the nursing profession from the standpoint of an LPN or RN.

THE COURT: Well, you asked her if she was a licensed nurse and she said, "I am a registered nurse. She was an LPN. She stated she had not worked much as an LPN, but had done some private duty. At the time she was working
20 in a dry cleaning business. I had no reason to believe she would not pass the work academically." I paraphrased that.

I'll let him ask the question, it's before me and not before a jury.

MR. DIEHL: Yes, sir.

THE COURT: Proceed, answer the question.

A. Would you repeat the question, please.

Q. (By Mr. Williamson) Mrs. Hayes, what is the practical difference between the duties performed by a registered nurse and those duties performed by a licensed practical nurse? A. Of course, there are quite a few. It has to do with responsibility for one thing. In fact, the licensed practical nurse works under the supervision of a registered nurse as one example.

I at this time did make any – I didn't have any feeling about or appreciate for whether she could perform as a practical nurse, that didn't enter into my evaluation. I was looking at the fact that in the area in which I worked with

students, I would have some difficulty accepting her as a student from a safety standpoint and this comes up – has come up before as a matter of fact. As an instructor I'm liable from a malpractice standpoint for the students who
21 work with me and if I question whether the student is able to perform the duties in the clinical area safely, then I can say then I will not, you know, work with the student in the clinical area.

I don't know if that answers the question but I'm trying to give you an idea of what I was thinking about when I made the evaluation.

Q. In respect to that, do I understand that licensed practical nurse is one that works under the supervision of a registered nurse, who is in a position to delegate certain duties? A. That's correct.

Q. And to supervise what she does? A. That's correct.

Q. Whereas, a registered nurse does not have that supervision? A. That is correct.

Q. Did you foresee a danger which may develop –

THE COURT: She is your witness you can't lead her.

Q. All right, Your Honor. Would you state whether or not, Mrs. Hayes, you foresaw any danger to patient care by the fact that you discovered that Mrs. Davis was severely hard of hearing? A. Yes, when it comes to like, particularly in emergency situations and as an example in the labor and
22 delivery areas, things move pretty quickly. It is the registered nurses' responsibility to accept verbal orders sometimes. There are some medications that sound a little bit alike. This is an example of what I was thinking about in relation to this.

MR. WILLIAMSON: Thank you, Ma'am.

RECROSS EXAMINATION

By Mr. Diehl:

Q. Do I understand what you are saying in your particular specialty, and that is the psychiatric nursing and in the maternal field – A. Right.

Q. – that you could foresee some problems?

A. Definitely.

Q. Now there are other areas of the nursing profession that Frances Davis could accomplish everything expected of an RN; is that not also correct? A. As a part of the nursing program we have to certify that the graduate can function in any and all areas of nursing. We do not have a process or a procedure which we can certify for one area.

Q. Are you not familiar with areas of nursing wherein she can function in an adequate manner? A. I do not know.

Q. Now when you stated that you would have difficulty
23 accepting Mrs. Davis in the maternal nursing area, do I understand that you were saying that the difficulty would be because she would require extra or almost constant supervision? A. That's part of it.

Q. In the training program? A. That would be part of it.

MR. DIEHL: That's all.

THE COURT: Do you want this lady to stay or do you want to excuse her?

MR. WILLIAMSON: They are all together. She won't be able to go until the others leave.

THE COURT: She's a nurse, she might be needed somewhere.

Whereupon,

VIRGINIA RIGGIO,

was called as a witness by and on behalf of the Defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. Would you state your name, please, Ma'am?
A. Mrs. Virginia Riggio.

Q. In 1973-74 academic year were you associated with Southeastern Community College? A. Yes, sir, I was.

24 Q. In what capacity? A. Director of the nursing program.

Q. Have you since that time retired? A. Yes, at the end of 1974, May 25.

Q. Mrs. Riggio, do you know Mrs. Frances Davis?
A. No, I did not know her.

Q. Did you know her as a student at the Southeastern Community College? A. No. I knew her as a student when she was wanting to be considered for the nursing program. She was on campus in the college related subjects that year before.

Q. Now when a student wanted to make application to the Associate Degree Nursing program, what procedural steps did they follow? A. At the time that they were interviewed in the general admissions office, they indicated an interest in the nursing program. They were then assigned to a counsellor in college and were guided to take the courses that would help them to be considered for the nursing program, the related subjects.

Q. Did you have any direct contact with Mrs. Davis until the application that she had made to the college came up to be considered by the selection committee? A. No, I don't believe I had. She hadn't had any contact with us.

25 Q. Did you serve during the spring of 1974 on the selection committee for the applicants to the Associate Degree Nursing program at the college? A. Yes, I did.

Q. Do you recall who served on that committee with you? A. Dean Ball, Julie Mola, Jim Schmidt and myself

and usually one other faculty member from the college.

Q. Mrs. Riggio, were you at that time familiar with the admissions criteria which was administered by the college?
A. Yes.

Q. I hand you a paper writing which has been marked Plaintiff's Exhibit 3 and has already been offered into evidence and ask you if that is the admissions criteria which was in effect at the time that Mrs. Davis made her application for admission to the Associate Degree Nursing Program?
A. Yes, it is.

Q. Do you have a copy of that? A. No.

Q. Mrs. Riggio, did the selection committee with which you served consider the admissions criteria in determining whether or not an applicant was eligible for admission to the Associate Degree Nursing program? A. Yes.

26 Q. Do you recall when Mrs. Davis' application came before the committee for selection? A. I believe it was probably about the second week in April.

Q. Do you recall at that time what you had before you in the way of evidence or her record to be considered as to whether or not she was eligible for the program?
A. We would have had her initial application to the college, her college and guidance and placement test scores, references, about three to five references, her high school record, her interview.

Q. Now following the action of the selection committee at that time in denying her application, did you personally make further efforts to determine the extent of her hearing difficulty? A. Yes, it was a concern because of what had come out in the interview about the hearing problem and we felt in fairness to her we needed specific information as to her hearing ability. I spoke to her and told her that this was one of the requirements and it could be someone of her choice. She had said Dr. Panalochas in

Fayetteville, but then she decided to go to Duke.

Q. As a result of her referral to Duke, do you know that she was examined by an audiologist named Burton B. King? A. Yes.

27 THE COURT: When you say she went to Duke, does that mean Duke Medical School? You see Duke in South Carolina is a big football team up here. A. It would be Duke Hospital, Medical School.

Q. You are making reference to Duke Medical Center? A. Yes, I am.

Q. I hand you another paper writing which has been offered as Exhibit Number 6 by the Plaintiff and ask you if that is a copy of the medical report which was delivered to you or to your committee from Mr. Burton B. King, the audiologist? A. No, I don't believe –

Q. Mrs. Riggio, that medical report there was not – that was not a report sent to you by Burton King, was it? I believe that was a report that was personally obtained by Mrs. Davis? A. Yes, because it's a different format altogether than I have on April 25, 1974.

Q. Now prior to that, did you write Dr. Koontz at the Speech and Hearing Clinic at the Duke Hospital in Durham on April 23, 1974 with reference to Mrs. Davis? A. Yes, I did.

Q. Now calling your attention to that particular letter dated April 23, 1974, I hand you a paper which has been

28 marked Plaintiff's Exhibit No. 7. Now I will ask you if you would identify that as to whether or not that is a letter that you wrote Dr. Koontz? A. Yes, that is the letter I wrote to Dr. Koontz.

Q. Now what was the purpose of that letter, Mrs. Riggio? A. We wanted a statement from him concerning her hearing and whether or not he felt that she could function in a nursing program because we had found that when somebody spoke to her from behind or to the side, that she had difficulty understanding what was being said and we also wanted to know if her hearing test would place her within the normal speech range and also whether or not the hearing loss could be corrected.

Q. As a result of your letter to Dr. Koontz did you receive a reply from him dated April 25, 1974? A. Yes, I did.

Q. I call your attention to a paper writing which has been marked Plaintiff's Exhibit number 8 and ask you if that's the letter you received from Mr. Burton B. King in response to your letter from Dr. Koontz? A. Yes, it is.

Q. Now upon receipt of that letter, what, if anything did you then do, Mrs. Riggio, as far as Mrs. Davis' application is concerned? A. I believe then I would have taken her folder to the admissions committee with this addi-

29 tional information for them to be able to reach a decision on whether or not she could be accepted into the nursing program.

Q. Di you contact Mrs. Gray, who was Executive Director of the State Board of Nursing at that time regarding this matter? A. Yes, I did.

Q. And was the medical information regarding Mrs. Davis provided to Mrs. Gray? A. Yes, it was.

Q. Did you receive a letter from Mrs. Gray dated May 17, 1974, which I think has been identified, Your Honor, as Plaintiff's Exhibit Number 11. A. I wrote a letter on May 14 as to her – the safe involvement of Mrs. Frances Davis in the nursing program considering her hearing difficulty.

Q. Was the response of Mrs. Gray dated May 17, 1974? A. Yes, it was.

Q. Mrs. Riggio, would you read to us the context of the letter from Mrs. Gray? A. "This is in response to

your request by telephone on May 13 and restated in your letter of May 14 for our opinion as to the safe involvement of Mrs. Frances Davis in the nursing program considering her difficulty.

We concur with your opinion as stated on the telephone
30 that Mrs. Davis' hearing disability can preclude her being safe for practice in any setting allowed by license as an RN or by a license as an LPN. More over, we would question the adviseability of you and the faculty assuming the responsibility for Mrs. Davis' involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with Mrs. Davis' hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of the nursing program.

The basis of our opinion is found in the audiologist's response to you from Duke University on April 25th and the relationship of this response to expectations of nurses in patient care. If she is allowed to see the talker and use her vision to aid her in interpreting the speech of others she can perform satisfactorily in most learning situations. While wearing a hearing aid she is well aware of gross sounds occurring in a listening environment, however, she can only be responsible for speech spoken to her when the talker gets her attention and allows her to look directly at the talker.

Both you and I can identify enumerable patient care situations in which this lady's abilities as defined in the quoted paragraph would be inadequate to respond to the patient's needs. In fact, it would be inadequate for her probably to identify all the patients needs for which she
31 would be accountable or even to pick some obcluse situations that could be quite critical to the point of life-death situations.

Certainly, it must be frustrating to an individual as Mrs.

Davis, who according to your identification, is very intelligent and has a determined interest to pursue nursing not to be able to fulfill this goal. However, how much more frustrated she might become if she be enrolled in the program and experience a different kind of trauma in terms of missing some very important clues in patient care or even in experiencing a wrong measure of patient's needs.

I believe that you indicated on the telephone that there are other career avenues open to her which would capitalize upon her abilities and which the hearing disability would not be a significant barrier as it could be in nursing. We would urge the college in counselling Mrs. Davis to alter her career goal as we do not believe on the basis of facts we have now that Mrs. Davis would either be safe for herself or for patients, or for faculty to pursue a nursing education program and we will be interested to know what route Mrs. Davis does elect in terms of an alternate opinion.

Miss Mary McKree, Executive Director, North Carolina State Board of Nursing."[*]

Q. Based upon the medical information which you received from Duke Medical Center and the letter that you received from Miss McKree, together with other evidence which was available at that time, was the admission of – was the application for admission of Mrs. Davis rejected or declined? A. Yes, it was.

MR. WILLIAMSON: You may examine.

CROSS EXAMINATION

By Mr. Diehl:

Q. Now Mrs. Riggio, you had the overall supervisory duty for the nursing program at the college; is that correct?
A. Yes, I did.

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*Miss Mary McRee's last name is misspelled "McKree" throughout the transcript. See p. 134a, *infra*.

Q. And in the final analysis when the selection committee met you would make a recommendation as to the acceptability of the student under your care and supervision; is that correct? A. I voted as a member of the committee.

Q. Now in the application for Mrs. Davis, when she filed it in the spring of 1973 with the college, that was about March of 1973; is that correct? A. Yes.

Q. And shortly after that time a Mrs. Ashley, around April 25, 1973, conducted an interview with Mrs. Davis?

33 A. Yes.

Q. Is Mrs. Ashley a member of your staff or was she at that time? A. She was at that time.

Q. So as of April 25, 1973, you were acquainted with the hearing difficulties of a prospective student who had indicated in her application that she wanted to pursue the RN program; is that correct, or RN training program? A. Yes.

Q. And that program is called the Associate Degree in Nursing? A. Yes.

Q. Now in April of 1973 until the interview with Mrs. Odum, now Mrs. Hayes, in March of 1974, nothing was done to contact or work with Mrs. Davis concerning the possibility that she might not be accepted inot the ADN program; is that not correct? A. I believe that Mrs. Davis was assigned to Mrs. Julie Molla, now Stocks. Julie was acquainted with the fact that Mrs. Davis, we had detected she had a hearing problem and it was suggested that she talked with her in her counselling as she helped her to make her program for the next year about the possibility about this might could cause a problem.

Q. Did that conversation take place, approximately,

34 March of 1974 immediately before Mrs. Odum's interview? A. No, this would have been in '73. She was on campus taking college related courses for a whole year before she wanted to come into the nursing program.

Q. By her application to college did she not designate that she was intending to enter the ADN program?
A. Yes.

Q. And the programs or courses which she took during the '73-74 school year, were they not specifically courses that were involved in preparatory work for the ADN program? A. They would be part of the required curriculum but they were general college courses.

Q. Now Mrs. Riggio, when you first met with Frances Davis, do you recall when that was? A. March 18, 1974.

Q. That's the same day that Mrs. Odum, now Mrs. Hayes, interviewed Mrs. Davis; is that not correct?

THE COURT: That's the same day.

A. Same day.

Q. Do you know whether your interview or your meeting with Mrs. Davis took place before or after Mrs. Odum, now Mrs. Hayes, interviewed Mrs. Davis? A. I believe it took place after.

Q. Afterwards. And you had the benefit of Mrs. Odum's report and evaluation; is that correct? A. Yes,

35 I did.

Q. As well as Mrs. Ashley's from a year ago?
A. Yes, sir.

Q. And at that time as a result of your talking with Mrs. Davis, she went to Duke University to the Medical Center and saw Burton King; is that correct? A. Yes.

Q. And you know that Dr. or Audiologist Burton King changed the prescription of her hearing aid, in fact, prescribed for her a new type of hearing aid that he said improved her hearing capability; is that correct?
A. Yes.

Q. And in fact, improved them to the outer range of normal; is that correct? A. Yes, that's what he stated.

Q. Now as a result of your communications with Mr. King, you then contacted Miss Mary McKree, State Board of Nursing? A. Yes.

Q. The State Board of Nursing is a regulatory body established by the State of North Carolina by statute; is that correct? A. Yes.

Q. And it is the licensing agency for anyone in the nursing practicing progession; is that correct? A. Yes.

36 Q. It licenses both LPN's and RN's? A. Two different tests but they do license.

Q. The distinctions being though in the theory between an LPN and an RN as far as the tests are concerned, is that correct? A. It would be testing the theory as well as practice application.

Q. At the time that you contacted the State Board of Nursing you did that the first time by telephone, I believe? A. Yes.

Q. And that was May 13th. At that time you did not tell Miss McKree that Frances Davis was a practical nurse; did you? A. I honestly can't remember.

Q. Well, I ask you to refer to the exhibit, the letter of May 17th and ask if the second sentence–

THE COURT: What's the exhibit number?

MR. DIEHL: If Your Honor, please, this would be Plaintiff's Exhibit Number 10.

THE COURT: All right, please, refer to the exhibit numbers. See, you people know what you are reading, but I don't. The exhibit number if my direction.

Q. Plaintiff's Exhibit Number 10, which is the letter

37 to you from Miss Mary McKree dated the 17th of May? A. Yes.

Q. And in that, the second paragraph reads, "We concur with your opinion as stated on the telephone that Mrs. Davis hearing disability can preclude her being safe for practice in any setting allowed by a license as an

RN or by a license as an LPN; is that correct? A. Yes.

Q. But you do know that Mrs. Davis is a licensed practical nurse? A. Yes, I knew she was an LPN.

Q. Mrs. Riggio, the reason for the disapproval of this application was because of the interpretation of the State licensing procedure by Miss McKree as concerns Mrs. Davis' hearing; is that correct? A. Her opinion was taken into consideration because our prime consideration in considering Mrs. Davis was whether we felt we could endorse her as a safe practitioner with physical and moral capabilities. We have to do with as part of endorsement for State Board in order for her to go to the State Board and take the exam.

Q. That is totally directed toward whether or not she can practice as and be licensed as an RN: is that correct? A. Yes.

38 Q. You have made no distinction as to whether or not she was capable of and qualified to accept the classroom or the educational benefits of the ADN program; did you? What I am saying, Mrs. Riggio, is that the decision was as to whether or not she could practice and be licensed as an RN? A. Yes.

Q. And not as to whether she was suitable for the educational instruction offered by the ADN program? A. We have to look at it in total because the theory and practice are intertwined and you can't consider a person just as excellent in theory or excellent in practice. They have to have both of these and that had to enter into our decision.

Q. In the selection process, Mrs. Riggio, did you notice any difference in conversations with Mrs. Davis after the prescription of the new hearing aid? A. I honestly could not tell you because I'm not certain when she got the hearing aid, but I would refer you to Dr.

King's, where even with a hearing aid she still has to have the person get her attention and speak directly to her in order for her to distinguish the gross sounds in the situation.

Q. During the training that is offered by your school in the clinical portion, that's done under the supervision
39 of an instructor; is it not? A. Yes.

Q. Would Mrs. Davis have required additional supervision? A. We felt that she would. Our instructors are responsible for anywhere from eight to twelve students in the clinical area.

Q. At the time of the rejection of Mrs. Davis' application, the college had a working agreement, a contract with Southeastern General Hospital for the clinical portion of the nursing program; is that correct? A. Yes.

Q. Immediately prior to your retirement, Mrs. Riggio, was there not a conflict between the college and the Southeastern General Hospital wherein it was stated that the contract would not be renewed unless the college provide closer and more adequate supervision to the nurses training in the clinical portion of the work?
A. I'm not familiar with that.

Q. You are not familiar. That's all.

REDIRECT EXAMINATION

By Mr. Williamson:

Q. Mrs. Riggio, with reference to the letter that you received from Burton King, which has been identified as Plaintiff's Exhibit 8 and more particularly with reference to her inability to communicate except by sight, would
40 you read the last paragraph on the first page of that letter dated April 25, 1974? A...To answer your specific questions, I should state that Mrs. Davis does not possess normal hearing, however, with a hearing aid on her right ear she is very skillful in communicating with

other people. If she is allowed to see the talker and use her vision to aid her in interpreting the speech of others, she can perform satisfactorily in most listening situations. While wearing a hearing aid she is well aware of gross sounds in the listening environment, however, she can only be responsible for speech spoken to her when the talker gets her attention and allows her to look directly at the talker."

Q. As the director of nurses, would it have been your responsibility to complete the certificate to the State Board of Nursing had she been allowed to complete the ADN program? A. Yes, it would have.

Q. I will ask you whether or not in that certificate of the school that it was necessary that you certify that the applicant would be capable of providing safe nursing care as well as being of good moral character? A. Yes.

Q. Was this a factor which was taken into account in determining her eligibility for this program? A. This
41 was the factor, yes.

MR. WILLIAMSON: I have nothing further.

RECROSS EXAMINATION

By Mr. Diehl:

Q. Mrs. Riggio, the same application for the LPN program is submitted upon the graduation of the candidate; is it not? A. I don't believe it's the same application. It would be a different application.

Q. But the wording is in a similar manner, would it not be, as to the physical qualifications of the applicant?
A. I would imagine it would be similar but we would have to remember that she would be functioning under different situations as an LPN that we would as an RN.

Q. There are no physical distinctions in qualifications for RN and the LPN that you know of; are there?
A. I don't believe so.

Q. And as far as the ability of Mrs. Davis to receive

the educational process, you know of no reason why she could not have received the educational benefits of the ADN program just by virtue of her physical disability; do you? A. The thing is that the ADN program leads to the point where we endorse for registration as an RN and I would think that we would have to take into consideration the physical as well as the others if we are going to
42 take somebody in with the idea this is where they are headed.

Q. Do I understand then you are saying that you felt at the time of her application, irregardless of whether she could do the educational work or arrive at the proper educational level, that at that point, time of admission, you were unwilling to certify that she could practice and be licensed as an RN because of her hearing limitations; is that correct? A. Yes.

Q. And that interpretation was based upon the opinion submitted by Miss McKree of the State Board of Nursing; is that correct? A. With the report from Dr. King.

MR. DIEHL: No other questions.

FURTHER REDIRECT EXAMINATION

By Mr. Williamson:

Q. Mrs. Riggio, following the initial rejection by the selection committee in the spring of 1974, was there another committee organized and was her application reconsidered later on in the summer of 1974 after having received these various letters and other information that you have testified about? A. We of the faculty were asked in July, I believe it was, to reconsider her application and we submitted a memo to Dean Ball at that time
43 that we had reconsidered her application and we still stood by our original decision of the admission committee.

Q. I'll ask you if this subsequent committee was a different group than the original selection group? A. Yes, it was.

Q. Do you recall what the second committee that reconsidered her application, do you recall what it was composed of? A. I believe I stated it was the nursing faculty on campus during the summer and it would have—

Q. And this was a meeting where her total application was reconsidered? A. Yes.

Q. And again after reconsidering it, what action did the faculty committee then take in reconsideration?
A. They stood by the original decision of the admission committee.

FURTHER RECROSS EXAMINATION

By Mr. Diehl:

Q. Miss Riggio, this reconsideration came about as a result of a request by Frances Davis to appeal your decision or original decision of your committee? A. Yes.

Q. And as a result of that the new or the summer faculty met and reviewed the application and again
44 rejected the application? A. Yes.

Q. And then there was appeal to the Dean and to Dr. McCarter by Mrs. Davis; is that correct? A. I wasn't there then, but I believe it did occur, yes.

Q. At no time did you or anyone else request that Mrs. Davis make a written notice of appeal or a grievance; did you? A. I would not be familiar with that because I wasn't there.

Q. During the time that you were actively involved in the initial and second decision, did you ever request her to file a written grievance as to the rejection of the application when she told you she wanted to appeal this decision? A. Not that I can recall, that wouldn't have been within my province.

MR. DIEHL: That's all.

THE COURT: May I ask you a question, Ma'am, as I understand it, in your field of endeavor there are two

phases of training, one is called educational and the other is called clinical? A. Yes.

45 THE COURT: The educational, don't agree with me because I'm a judge, people do that sometimes and I have to caution them, I would assume the educational courses, like anybody else would take in pursuit of an academic degree or professional degree; is that correct? What is the educational program if it's not something like that? A. Well, she would take, for instance, medical-surgical nursing. Now she would have classes, the theory part so many days.

THE COURT: The surgeon would come in and talk? A. Lectures. Along with this, she would have her clinical practice two days a week in the clinical area and in order to go on to the next quarter in the program she would have to achieve a satisfactory graade in the clinical. Even if she got a straight A in the theory, if she did not pass the clinical she could not go on to the next quarter.

THE COURT: The clinical, I suppose that's where she goes around to the surgical wards and visits and does different tasks that she is assigned to do? A. Yes, she is assigned by her instructor to certain patients and she carries out her assignments for that day and is evaluated.

THE COURT: She's the people that give you a sleeping pill and then keeps you awake for so many visitors. I think I understand that. When you say the educational program, is there any way to separate it from the clinical

46 program or have you ever separated it before from the clinical program in the training of any person for this ADN degree, which I assume has the same or similar rank to an RN? A. No.

THE COURT: It does not. Does it have a similar rank, Associate Degree of Nursing? A. It's leading to the preparation to take the registered nurse exam.

THE COURT: Have you ever in your career as a

supervisor, and I will ask you only how long you have been a supervisor? A. I had three years at Southeastern Community College as a director of the nursing program and I had five years previously as a registrar and general counsellor in the three year program.

THE COURT: In that period of time, did you ever have a separation of the educational from the clinical? A. No.

THE COURT: As a professional, who I think is recognized by your positions, have you ever heard of a separation? A. No, sir. Even if we took a student that had been in another program and came to us, we would still have to evaluate to see what she had had and make up the deficiencies because we have certain things that we feel they have to be able to do in order to

47 graduate in both the theory and the practice and they have to have that and if they miss enough days in the clinical they have to make that up before they can graduate.

THE COURT: I generally use the word academically wrongly, I suppose you give academic tests or grade on what is taught in the classroom? A. Yes.

THE COURT: You said she would make a straight A. Does that testing include the clinical applications? A. It would include, yes it would involve, because she would have to have the knowledge that she had already gained from her studies, but also the practical application in order to give you the correct answer because you would need the practical application to better understand a lot of the theory that you would have in class.

THE COURT. Thank you very much. Would either counsel like to pursue in view of the Court's questions?

MR. DIEHL: Could we have just a moment to discuss it?

THE COURT: Yes, sir.

FURTHER RECROSS EXAMINATION

By Mr. Diehl:

Q. Mrs. Riggio—I'm sorry this would be the Defendant's witness, first.

48 THE COURT: Do you wish to pursue?

MR. WILLIAMSON: Yes.

FURTHER REDIRECT EXAMINATION

By Mr. Williamson:

Q. Mrs. Riggio, to go just a step further, what areas would a student actually be involved in in the clinical portion of this training, that is in the hospital? A. In medical and surgical wards, they have an experience in the operating room, they have experiences in post-partum labor and delivery, the nursery, psychiatric, the beginning fundamental nursing skills and in the second year to to the more advanced medical-surgical nursing skills with particular experiences in intensive care-coronary care, this sort of thing.

FURTHER RECROSS EXAMINATION

By Mr. Diehl:

Q. Mrs. Riggio, in the clinical aspects of the program, all the work is done under the supervision of faculty; is that correct? A. Yes, it is.

Q. And what would be required of Frances Davis in additional supervision that the faculty was not at that time prepared to offer her; is that nor correct? A. Yes.

Q. From a standpoint of everything that the student

49 nurse does in the RN program, the faculty is required to and is responsibile for the supervision? A. Yes, they are.

Q. Now, for instance, in the administration of IV fluids or a blood transfusion, can a student nurse do that and do that? A. At the time that I was with the program we were not preparing students to do this.

Q. In other words, what I understand you are saying then, there were areas where the professional skills involved

were of such a nature that the students were prohibited from carrying on the very meticulous acts that might be involved; is that correct? A. There are certain things that they do not perform. We have a set criteria of what they should be able to perform, say, as a first year student when they finish fundamental areas of nursing and there are procedures that they have to be able to carry out.

Q. Mrs. Davis with an instructor supervising her could have accomplished all of the skill levels in the clinical program; could she not? A. There is the possibility that she could if she just had one person with her to completely supervise and make sure that she understood what was being said and what she was to do and that she understood her patient.

50 Q. The problem was the college was not in a position it wanted to modify its program to compensate for Mrs. Davis' handicap; is that correct? A. Yes, plus under State Boards we are not allowed to tailor make a program for a particular person. She has to go through the very same equal opportunities that every other student does and would be expected to perform.

Q. I understand. Now going solely to the training level, whether it's education in theory or in clinical practice, do I understand you correctly that you are saying that the college was not prepared to provide her with the supervision that might be necessary to compensate for her handicap in the clinical program? A. No, we were not prepared.

MR. DIEHL: You were not prepared, that's all.

MR. WILLIAMSON: I would like to ask Mrs. Riggio one further question.

FURTHER REDIRECT EXAMINATION

By Mr. Williamson:

Q. Mrs. Riggio, do you have personal knowledge of the number of applicants in 1974 academic year for the ADN

program at the college? A. I couldn't tell you a specific number but there were probably anywhere from a 150 to 175.

Q. Could you tell me whether or not in reviewing the
51 application of Mrs. Davis and her suitability for the program, whether or not you used any different standards of measuring her capabilities than you did any of the other applicants? A. No.

Q. Was she treated like everybody else in the selection process? A. Yes.

MR. WILLIAMSON: Thank you, Ma'am.

THE COURT: Anything further, Mr. Diehl?

[Witness excused].

MR. WILLIAMSON: Mrs. Stocks.

Whereupon,

JULIA M. STOCKS,

was called as a witness by and on behalf of the Defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. Would you state your name, please, Ma'am? A. Julia Molla Stocks.

Q. Mrs. Stocks, are you associated with Southeastern Community College? A. I am.

Q. Were you during the 1973-74 academic year? A. I was.

52 Q. What was your position there? A. I was a counsellor and a part of that year I was the advisor to the nursing program to help them.

Q. In this position did you have occasion to become acquainted with Mrs. Davis? A. Yes, I did.

Q. Do you know, approximately, when and what the circumstances were surrounding that? A. Yes, it was for fall quarter registation. She came to my office to make registration for the fall quarter.

Q. Was this in the fall of 1973? A. Yes.

Q. Now, did you serve as counsellor to her during that academic year? A. Yes, I did.

Q. Did you have contact with her frequently? A. I would say throughout the '73-74 academic year I saw her between four and six times.

Q. Did you discuss with her during that period of time her—the possibility of her being admitted to the ADN program at the college? A. Yes, I did.

Q. At that time, Mrs. Stocks, were you aware of her hearing problem? A. Yes, I was.

53 Q. Would you describe to the Court, please, Ma'am, what extent this includes your dealing with her? A. Okay, part of the application for has an answer form on it and the doctor had noted that she had hearing difficulty. So I talked with her about the hearing difficulty and said that she might have trouble in the training program at Southeastern and when she would graduate.

Q. Now did you serve in the spring of 1974 on the selection committee? A. Yes, I did.

Q. Mrs. Riggio was on that committee with you? A. Yes, she was.

Q. Do you recall who else served on that committee? A. Mrs. Pauline Ashley and Mr. Jim Schmidt.

Q. Mrs. Ashley, Mrs. Stocks, was she at that time Director of Nursing? A. No, Mrs. Riggio was.

Q. What was Mrs. Ashley's position if you recall? A. She was a nursing faculty member.

Q. What about Mr Schmidt? A. He was Director of Admissions.

Q. Do you know where Mr. Schmidt is now? A. Stetson University Law School.

Q. And what about Mrs. Ashley? A. I do not.

54 Q. She is no longer with the college? A. No.

Q. Were you familiar with the admission criteria for the Associate Degree Nursing program, Mrs. Stocks? A. Yes.

Q. I hand you a paperwriting which has been marked Plaintiff's Exhibit 3 and ask you if that was the admissions criteria used by the selection committee during that particular period when Mrs. Davis' application was being considered? A. Yes, sir.

Q. What did you have before you in determining her eligibility, if you recall? A. During the selection process?

Q. Yes, Ma'am. A. We had the application form, which included a medical form, a dental form, two suitabilities and I believe in her case she had three to five, a transcript of her high school, her comparative guidance and placement schools and her grades at Southeastern Community College.

Q. Was it then your decision as part of the committee that she could not function in the ADN program? A. Oh, we did have an audiologist's report at that time, it had just come in and on the basis of that plus the other infor-

55 mation we decided.

Q. You had received Mr. Burton King's report? A. Yes.

Q. So you had that information also? A. Yes.

Q. You didn't serve on the second committee? did you? A. I did not.

MR. WILLIAMSON: Thank you.

CROSS EXAMINATION

By Mr. Pate:

Q. Mrs. Stocks, if I understand your testimony correctly, you became involved as a counsellor and advisor to Mrs. Davis sometime in March, 1973; is that correct? A. No,, it's not.

Q. When was it then? A. Fall of '73-74 academic year.

Q. And you indicated, I believe, that you met with her during that academic year some four to six times; is that right? A. That's correct.

Q. What would you talk about at these meetings? A. The requirements for the Associate Degree Nursing program and, you know, the things that she had to get in, her application forms, all the things I just cited had to be for the committee even to consider her application, had to be a

56 complete file. So, we talked about this, then we did discuss her hearing difficulty.

Q. And you first learned of her hearing difficulty by virtue of the fact you looked in the file and you saw it in the medical report; is that correct? A. That's correct.

Q. During these meetings you had no problem as far as communicating with Mrs. Davis; did you? A. I did not, but she was like right her to me, too, she was very close.

Q. Now is it not a fact, Mr. Stocks, that throughout the school year in these four to six meetings that you had, that you encouraged Mrs. Davis to pursue the ADN degree; is that not true? A. I encouraged her. When I first found out about her hearing difficulty and talked with her about it I encouraged her to look into this problem to see how that might effect her admission into the program. I told her that she had the right, as did everyone else, to take courses at the college, general college courses.

A. After you discussed this with her, she nonetheless

communicated to you that she wanted to go into this particular area and you did, in fact, encourage her, didn't you, on several occasions? A. I would not say it was encouragement.

57 Q. How would you characterize it? A. I would say it was a realistic discussion of the facts and what might be involved in her admission into the program.

Q. Are you a registered nurse or LPN? A. No, I'm not, I'm a counsellor, and let me clarify the position at this time, the '73-74 academic year and immediately after that they wanted to have a counsellor talk with the people who applied for admission to the Associate Degree and the Licensed Practical Nursing Programs, the reason being that we had many more applicants than we had space and not all the students would be able to make it by reason of grades or any other kind of thing. So, they wanted to have a counsellor help the students make vocational choices into other kinds of careers if they decided they did not want the nurses programs or they were not capable of doing the nursing programs. That was the reason for the counsellor at that period of time.

Q. As her counsellor, you were aware of her grades throughout that school year; were you not? A. Yes.

Q. And her grades were good, were they not? A. Well, she did make a C in biology the first quarter, which is not that good. It is average. Then she made B's the

58 rest of the time. But the nursing slection committee does look particularly at biology and math.

Q. Her grades, you would generally characterize her as a B student, would you not? A. At Southeastern Community College. She did take courses at Pembroke that her grades were not B.

Q. Did you have occasion to see her grades from Robinson Tech? A. I did not.

Q. Now you indicated, I believe, that you were a member of this selection committee that reviewed the applications is that correct? A. Yes, I was.

Q. And did you have a vote on who was to be admitted? A. Not really. No, it was done by concensus, more or less, all the committee.. My advice was in my capacity as the counsellor. The other three members did the voting. I was just kind of there to share information about my conference as their advisor.

Q. Did you give an opinion to this selection committee that Mrs. Davis would not be able to accomplish the work in the ADN? A. I did not.

Q. You did not. A. No. I deferred to the medical specialists in the group, and to the nurses.

59 Q. Now following the disapproval of Mrs. Davis to the ADN program, did you have occasion to talk with her about this disapproval? A. I don't think I did.

Q. At no time? A. I don't remember that.

Q. Are you familiar with the grievance procedure of the college? A. Yes, I am.

Q. Did you ever at any time advise Mrs. Davis that if she did not approve of what the selection committee did that she had a right to make a grievance? A. I did not. I did see her at one time in the summer when she and her husband came to talk with informal discussion about the card and they asked me to come in for the discussion.

Q. Did you advise her at that time of the grievance procedure? A. I did not.

Q. Did you assist her in making out a written statement of any grievance that she might have? A. She did not ask me to.

Q. Are you aware that under the grievance procedure of the college that you are required to do that? A. I

60 don't understand the question.

Q. Well, let me ask you, this is Defendant's Exhibit 3, Your Honor, –

THE COURT: All right, show it to her.

Q. I hand you what has previously been marked as Defendant's Exhibit 3, and ask you if you have ever seen it? A. Yes, I have.

Q. Are you familiar with it? A. Yes.

Q. And are you familiar with this portion reading that the counsellor will assist the student, think through the grievance and if the student desires, assist him in developing a written statement of the grievance to be submitted to the student's dean. Are you familiar with that portion? A. Yes.

Q. Did you do that for Frances Davis? A. She never approached me about that.

Q. But at no time did you tell her about that procedure? did you? A. Well, at the time, the last time I talked with her was before the selection committee met.

Q. Didn't you indicate that you saw her one time after that? A. With a host of other people.

60 Q. You did not at that time indicate that there was a procedure that the college had for submitting grievances? A. That is not my role. I would not say anything to her. Dr. McCarter at that meeting, who is the president of the college, met with her and a host of other people and talked with her informally, called me in to say, "This is Mrs. Stocks, your advisor, Miss Molla, your advisor who will help you make, who will be there to help you make some other career choices." Then I left. Now I believe that Dr. McCarter did tell her there was a standard grievance procedure to follow.

Q. Mrs. Stocks you are not going to deny that the college's own grievance procedure and it says here the counsellor will assist in perfecting these grievances. You are not

denying– A. Are you suggesting, sir, that I should go around to every student and ask them if they want to make a grievance?

Q. You knew in this particular case, did you not, Mrs. Stocks, that this lady had a grievance? A. I did not know that.

Q. You were not aware that her application to the nursing school was disapproved? A. But how many people are disapproved. She was one of 40 people that were dis-

61 approved. And in the year past and in all the years that followed we did not ask every person that wasn't approved if they had a grievance and it is their responsibility to seek that course of action.

Q. Ther was, to be honest, isn't it true, Mrs. Stocks, that there was never really a great deal of emphasis put on this grievance procedure any way at that college; was there? A. I cannot say that.

MR. PATE: No further questions.

REDIRECT EXAMINATION

By Mr. Williamson:

Q. Mrs. Stocks, did I understand you to say in response to one of Mr. Pate:s questions, that you discussed with Mrs. Davis some alternate career programs outside of the Associate Degree Nursing Program? A. Well, there was two points, one before the selection committee met and one afterwards and when she was, in my advising, registering for different courses, we talked about other programs in generalities. Then after the selection process, then she met with Dr. McCarter and other people, he said, "All right, now is the time for you to make yourself available to Mrs. Stocks so she can help you with other health careers."

63 Q. Did she ever make herself available to you? A. I have not seen her.

Q. Did you ever see her any more after that particular day in Dr. McCarter's office; A. No.

MR. WILLIAMSON: Thank you.

[Witness excused].

Whereupon,

W. RONALD McCARTER,

was called as a witness by and on behalf of the Defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. Would you state your name for the Court, please, sir? A. W. Ronald McCarter.

Q. Mr. McCarter, are you asociated with Southeastern Community College? A. Yes, sir, I am president of Southeastern Community College.

Q. How long have you been associated with the college? A. Since December of 1973.

Q. You are acquainted with the situation of Mrs. Frances Davis; are you not? A. Yes.

64 Q. Dr. McCarter, did you have personal knowledge in the spring of 1974 of the number of applicants at the college for the ADN program? A. I did not keep up with the specific number of applicants but common knowledge is that we frequently have over 100 applicants each year for that program.

Q. What were the number of students that could be accepted into the program? A. 45 each year.

Q. Now did you know that year in the spring after the meeting of the selection committee that the application of Mrs. Frances Davis had been rejected by the selection committee? A. Yes, I knew that her application had been rejected.

Q. When did this first come to your attention? A. I don't remember the specific date, we get reports from the activities of the admissions committee about names of individuals who are being selected and who are not. I didn't really have specific knowledge about the whys and wherefores until the conference in my office in June.

Q. When was the first occasion that you had a face to face confrontation witn Mrs. Davis in the 1974 academic year? A. This occurred about the middle of the month

65 of of June when she came to my office.

Q. Had you seen her prior to that time? A. I don't recall seeing her prior to that time.

Q. Had you had any conversation personally with her prior to that time; do you recall? A. I don't recall any conversation.

Q. Would you describe to the court, please, the circumstances surrounding that meeting? A. Mr. and Mrs. Davis came to my office that day. They came in and said that they would like to discuss her rejection by the admissions committee. I had them seated in my office and then I called as many people together as I could find at that moment who were involved, which included Mrs. Riggio, Jully Molla Stocks, Dean of Students Dan Moore, and there may have been one other nursing instructor, I'm not positive of that. I tried to get as many people together as I could, who knew something about the details of the situation.

Q. Was this meeting anticipated? A. No.

Q. Had Mrs. Davis written you or called you or made any formal request for a meeting? A. I don't recall anything other than her just coming in.

Q. Now as a result did this meeting take place there

66 in your office? A. That's correct.

Q. Over what period of time would you say that it covered? A. At least an hour, maybe two.

Q. Would you please tell the Court what took place? A. I said, Mrs. Davis asked if she could discuss her rejection. We did get the people together who knew something about that rejection. We did discuss the reasons for it. I told Mrs. Davis at that time that since she had voiced an interest in discussing that with me that I would ask the committee to reexamine her case and to review her case to be very certain that their decision was sound.

I did ask the committee at that time to work closely with Dean Moore, the Dean of Students, to review all the facts of the matter and to render an additional decision, a reviewed decision.

Q. Do you recall the manner in selecting the committee to review Mrs. Davis' application and by whom it was reviewed? A. That question would have to be answered by the Director of Nursing, Mrs. Riggio.

Q. Now Dr. McCarter, did you discuss with Mrs. Davis on this occasion in your office the grievance procedures as
67 provided by the college. A. I explained to Mrs. Davis that day that we would review the case by the nursing admissions committee and we would ask that nursing admissions committee to give it any reconsideration which they could give it.

I also explained to her that if they came back with the same decision she would have the right to appeal it all the way to the Board of Trustees.

Q. I hand you a paperwriting, which has been marked Exhibit 25 and already introduced into evidence entitled "Grievance Procedure" is that the grievance procedure that was in effect at the college on that occasion? A. It looks like the grievance procedure that was in effect.

Q. What, Dr. McCarter, was the procedure that Mrs. Davis would have followed in expressing her grievance? A. You mean subsequent to the review of her case?

Q. Yes? A. All right, after the committee had reconsidered her case and rendered the decision, I believe which was expressed to her in August by the Dean of Students, if she had followed the grievance procedure, she would then have approached one of our counsellors or possibly Dean Moore himself who wrote her the letter and she would have asked him to assist her in writing a formal grievance. Once
68 the formal grievance was written it would be taken before a committee, a grievance committee of the college, which is made up of students and faculty. The decision at that point would have been appealed to my office and from my office to the Board of Trustees and the decision of the Board would have been final.

Q. Do you know of your own knowledge as to whether or not Mrs. Davis availed herself of any of these administrative procedures? A. I have no knowledge of her initiating that process.

Q. Following your meeting in your office, do you recall whether or not you had any further word from her or any contact with Mrs. Davis? A. I don't recall any other personal contact with Mrs. Davis.

CROSS EXAMINATION

By Mr. Diehl:

Q. Dr. McCarter, referring to Defendant's Exhibit Number 25, I believe it is, as to the grievance procedures, where does it say in there, sir, that the appeal is to the Board of Trustees? A. We made that option open to any student or any faculty member to appeal any decision of the president to the Board.

Q. But it is not printed there, is it? In fact, what is
69 printed there is the appeal to the president? A. That's correct.

Q. So Mrs. Davis, first of all, had gone to Willard Small,

who was the chairman of the Board of Trustees and advised him of her grievance, you know that do you not, sir? A. I have no personal knowledge of that, sir.

Q. Did he call you? A. No, but I understand that he did talk it over with one of our other deans.

Q. And as a result of that communication to you and a request for an appointment by Mrs. Davis, you did make an appointment for her to see you; is that correct? A. That's incorrect.

Q. Did she not have an appointment to come to your office for this meeting in June? A. My recollection is that she just came in. I don't recall the appointment. In trying to ascertain that fact I looked back on my calendar and could not find evidence of an appointment.

Q. Now Dr. McCarter, when you met with Mr. and Mrs. Davis, at that point you called in Miss Molla and the Dean of the College, and was Mrs. Riggio involved in that; did you say? A. Yes.

70 Q. But she had already left the campus; had she not? A. At that date she had not left the campus.

Q. Didn't she testify earlier here that she was not involved in that decision, the second decision?

THE COURT: What?

MR. DIEHL: I apologize, did Mrs. Riggio in her testimony today, Dr. McCarter, testify that she was—strike that.

During the conference that took place in your office, Dr. McCarter, was not the emphasis placed on whether or not Mrs. Davis could be licensed and work, and could work in the field of a registered nurse? A. As I recall the general trend of the conversation was based around the reasons why the committee had made the decision that they had. The various reasons were cited, reasons such as her projected inability to function in the clinical

educational setting; her inability to safely work in the clinical-educational setting; the projected inability to be certified to sit for the State Board of Examiners was also discussed; and her safety in practicing as a nurse upon being licensed.

Q. You are talking about the inability to function in the clinical setting without additional supervision provided by the college; are you not? A. We did not discuss it in that matter. We discussed it in the matter of her

71 inability to function as a student in the clinical setting.

Q. Well, Dr. McCarter, did you not make a request of her that she gather statements from five hospitals in the area that they would hire her? A. Yes, we asked Mrs. Davis in preparation for the review of the file to get as much evidence together as she could to assist us in that review.

Q. And as a result of that you received a communication from Southeastern General Hospital that she would be hired there; did you not? A. The statement did come from the Director of Nursing at Southeastern Hospital and the Director of Nursing did say that she could be hired in certain kinds of positions.

Q. I hand you a copy of Plaintiffs Exhibits 15 and 17, and would ask you if you are familiar with these, Dr. McCarter?

THE COURT: This is your exhibits number 15 and 17?

MR. DIEHL: Yes, sir, Plaintiff's Exhibits.

A. Yes, I am familiar with those.

Q. And you received these letter as a result of inquiries as to whether or not Mrs. Davis was suitable for employment; is that correct? A. That's correct, sir.

72 Q. And the last paragraph of Plaintiff's Exhibit 15, which is the letter of July 1 reads, "I do not believe that

I can truthfully state that she would not be able to function in any area of nursing with her present determination to continue her education?" A. That's what it says there.

Q. Thank you, sir. Dr. McCarter, when you met with Mrs. Davis and her husband in June of 1974, you knew that Mrs. Davis had a grievance; is that correct? There was a dispute as to whether she should get into the program? A. When she came to my office and she that she would like to discuss it, I assumed that she did have a grievance.

Q. Did you go over with her any steps in the grievance procedure? A. I explained to her that that option was available.

Q. Did you tell her that she had a right to appeal to the Board of Trustees at that time? A. Yes.

Q. When, in fact, she had already talked with the president of the Board of Trustees by her own statement; is that correct? A. I don't recall her telling me one way or the other whether she had ever talked with the Chairman of the Board of Trustees.

Q. Did she not tell you that she was appealing to you
73 as president of the college for a reversal of the decision? A. No, she did not. She came in and said that she wanted to discuss the rejection.

Q. But you understood that she was wanting a review of that; did you not? A. We, in fact, asked the nursing committee to review it.

Q. And then you authorized the letter of August— strike that. Were you advised after the review as to the results? A. Yes.

Q. Did you discuss with Dean Moore the letter of August 8th, 1974? A. Yes, I was aware of that letter.

THE COURT: What exhibit is that?

Q. That is Exhibit Number 18.

And as far as you were concerned that letter closed out any further review in the matter; did it not?

A. No, it did not.

MR. DIEHL: That's all.

THE COURT: Anything further?

MR. WILLIAMSON: Nothing further, thank you.

[Witness excused].

MR. WILLIAMSON: Mrs. Berry.

Whereupon,

MARY BERRY,

74 was called as a witness by and on behalf of the Defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. State your name, please, Ma'am? A. Mary Berry.

Q. Are you associated with Southeastern Community College? A. Yes, I am the lead instructor for medical-surgical nursing and part of pediatrics.

Q' Were you associated with the college back in the Spring of 1974? A. Yes, I have been with the college since July of 1968.

Q. Are you acquainted with the situation involving Mrs. Frances Davis? A. Yes, I am.

Q. Mrs. Berry, did you serve on the faculty committee-nursing-faculty committee in the reconsideration of her application for admission to the ADN program at the college? A. Yes, sir. I served on the first time that she was presented to the nursing faculty. After the admissions committee had rejected her application, then they brought it before the nursing faculty, entire nursing faculty, that was in May.

Q. Could you tell us, please, Ma'am, who that committee consisted of, if you remember? A. Mrs. Hill,
75 Miss Hoose, Miss Shaw, Mrs. Riggio, Miss Odum, it was the entire faculty. It was before school was out. I'm not sure, was Miss Ashley there? I'm not sure, Miss Ashley.

Q. No one participated in that except the members of the faculty? A. It was the nursing faculty.

Q. Did you have before you at that time the various information including the medical report regarding Mrs. Davis' hearing problem? A. Yes, we had the complete folder with the exception of Miss McKree's letter and at that time when we were discussing it Mrs. Riggio called Miss McKree because we wanted her opinion then before we went further with our discussion.

Q. Miss McKree, identify her? A. Miss McKree is the Executive Director of the State Board of Nursing. And then after we talked with Miss McKree and had even a more expert opinion, we went ahead with our decision to reject.

Q. Had you had any personal contact with Mrs. Davis? A. No, sir.

Q. Your decision was based upon the records before you? A. Yes, sir, and on my experience as a nurse
76 for 20 years now.

Q. It was your opinion based upon that record that she would not be qualified or suitable as a candidate for the ADN program? A. Yes, sir.

Q. Would you explain to the Court, if you would, please, some reasons that you may have had for reaching that decision? A. Well, I have taught and practiced nursing, this is my 21st year, I guess, in nursing and I have worked in critical care areas for a major part of my—intensive care-coronary care units and now I am in high

risk nursing, so I have worked in ciritical care areas most of my time and when you are in a critical care area you frequently have, well, you do have life and death situations. You frequently will have a patient who is clinically dead that it's your responsibility to say, you have three minutes for the most part to take care of this patient, and if somebody cannot hear me when I call to them or the Doctor's orders when he calls to them to prepare medicine to give a patient you don't have any time to lose. Three minutes goes by in a might fast time. So I felt like it would be impossible for a person with this much hearing deficit to be able to meet the needs of patients in critical care areas.

77 We are not preparing a student, we are preparing a graduate. This is a person who is going to go out to practice nursing. When we are working in our school we are not preparing a student nurse, we are preparing a graduate nurse who can practice safely.

Q. Did you know at that time, Mrs. Berry, that certification to the State Board requires a certificate that a candidate can practice safe nursing? A. Yes, sir, I've known that, I had to take the same examination. I had to have the same form filled out.

Q. Based upon your knowledge of Mrs. Davis' condition, was it your opinion that she could practice safe nursing? A. I do not believe that Mrs. Davis could practice safe nursing in ciritical care areas.

Q. Do you happen to know of your own knowledge how many candiates had applied for the ADN program that year? A. I thought it was 153, was the number that sticks in my mind.

Q. Do you know from your association with the program how many students are admitted to the program? A. We can only take 45 students into our program.

Q. Was the selection process ragarding Mrs. Davis administered in any different way than it was for the other students who had applied for the program?

78 A. Normally, the student is rejected by the admissions committee, which would have been Mrs. Molla Stocks, Mrs. Riggio, Mr. Schmidt, and I've forgotten who the fourth person is, normally this would be it. But then she was brought before the faculty on two occasions, too.

Q. Do you recall whether or not that particular spring any other candidate for the ADN program was shown this much consideration? A. No, sir.

Q. Was there any other applicant that was reviewed by the faculty of nursing that you are telling me about? A. I don't recall any other person who was brought before the nursing faculty.

MR. WILLIAMSON: Thank you, Ma'am.

CROSS EXAMINATION

By Mr. Pate:

Q. Mrs. Berry, if I understood your testimony correctly, what you are saying is you personally have never sat down and talked to Mrs. Frances Davis; have you? A. No, sir, that's correct. I did not talk to Mrs. Davis. I did not know who Mrs. Davis was. I have seen her pictures, but I did not recognize her from the picture.

Q. And you are not an audiologist; are you? A. No, sir, I'm not.

Q. So, therefore, not knowing Mrs. Davis and not being an audiologist, you don't know whether she possesses

79 the requisite hearing to perform her duties or not; do you? A. I do not. I am depending on the professional opinion of the people that I work with that you must talk directly to her. I have not, I would be happy to do that in a critical care situation.

Q. And is it not correct that you based your opinion on an audiologist's report which that committee had; is

that correct? A. On the audiologist's report, on the report from Mrs. Odum who is a professional nurse, on Mrs. Ashley who also did an interview with her and on the basis of other people who had talked with her on the committee.

Q. Well, do you recall the audiologist's report, that being the one from Dr. Burton King? A. I did not know Dr. Burton King's name until I read these reports. I did know that we had an audiologist's report. The man's name did not stick in my head, but I have seen and read the audiologist's report.

Q. And that audiologist's report said that Mrs. Davis' ability to hear was correctible to the outer range of normal; is that not correct? A. That's what the report said.

Q. And basically, if aperson has normal hearing, is there anything that would keep them otherwise qualified from performing the duties of a registered nurse?

80 A. Are you telling me that she has normal hearing because if we are we don't need to be here.

Q. Let me ask you this, did you not just state that you read a report from an audiologist that said that her hearing was correctible to the outer range of normal? A. Yes, I did read that.

Q. Okay. You made reference to many life and death situations in your redirect testimony? A. Yes.

Q. Is it not true, Mrs. Berry, that there are many situations in which a registered nurse could function not involving life and death? A. There are many and I do do that too many times. Thank goodness they aren't all life and death.

Q. In fact, with a degree from the ADN program a person such as Mrs. Davis could become a nurse for an industrial firm involving practically no life or death situa-

tions; isn't that true? A. I do not know that industrial nursing, that's one area that I have not worked in.

Q. With this degree she could go on and get further training to become say an anesthesiologist; is that correct? A. She must be recommended by the faculty saying that she is safe in all areas before she can take her state Board. So, she would not get, we would

81 have to recommend her not, only the Director of the School, but another faculty member has to recommend her safe in all areas of nursing. You can't go to school and become a nurse. If we could we would be happy to have Mrs. Davis. But we can't say that we are preparing Mrs. Davis to function in one area, whether it be industrial nursing or some other area. We have to say that she she is safe in every area when we recommend her to the Board, that means the critical care areas, too.

Q. But it is true, is it not, Mrs. Berry, that there are many areas in the field of nursing in which a person such as Mrs. Davis could function; is that not so? A. Probably there are.

Q. Now when you had this meeting, you had the nursing faculty present; is that correct? A. Yes, sir.

Q. And who was in charge of that meeting?
A. Mrs. Riggio is our director.

Q. Now Mrs. Riggio had already made her mind up about Mrs. Davis' application; had she not? A. Mrs. Riggio had voted on the original committee, yes.

Q. And so would you say that was an impartial meeting, Mrs. Berry? A. I would say that was not an im-

82 partial meeting because we have eight faculty members. We could have easily outvoted Mrs. Riggio.

Q. Is it not true, Mrs. Berry, that everyone who was at that meeting already had their mind made up before the meeting was called? A. We had not. We discussed it in that meeting. Many of us had not had the

opportunity to read the audiologist's report until that meeting, so our minds were not made up. You might call some of the other faculty members.

Q. How long did this meeting take? A. I do not recall. I was a called faculty meeting.

Q. Was it 10 minutes, five minutes? A. Certainly not five minutes. I would never—our faculty would never decide in five minutes the fate of a person that wanted to come to our program. It certainly would not have been five minutes. We couldn't have read the report in that time. Eight faculty members around the table and one or two copies, it takes longer than that just to read the record.

Q. Is Mrs. Riggio or was she at that time your boss?
A. She was the Director of Nursing for the program.

Q. You worked directly under her? A. I did not consider her my boss.

83 Q. You worked directly under her; is that correct?
A. Yes.

Q. At this meeting in which Mrs. Davis' application was to be reconsidered, is it your testimony that Mrs. Riggio was, in fact, already against her being admitted?
A. I'm not saying that Mrs. Riggio was against anything. I'm saying Mrs. Riggio's review data had been presented, with the committee decided that we did not think that Mrs. David would be successful. We had not decided against her, we are for all the students. But we did not think that she would be successful in the nursing program for registered nursing. But Mrs. Riggio did not come to our meeting and say, "Listen now, I have this person who has a hearing defect and all we need is a rubber stamp."

We read the report, we discussed it as a faculty and I discussed why I thought it would be unsafe and each

faculty member did the same thing just as Mrs. Odum was up here this morning telling you why she thought she would be unsafe with her. Each faculty member tried to decide where it would be unsafe and we if we could decide if this person could be safe in nursing and we decided we did not think that she would be.

Q. In the areas dealing with life or death situations; is that correct? A. Also, I don't know whether you
84 consider a surgical unit, operating room a life or death situation or not. There are plenty of doctors in there and there are a lot of other people. This probably would not be a life or death situation but I don't know how many times you have to wait to get a response when you ask somebody for a piece of equipment, you know, I don't know, I wouldn't consider that life and death because there are other people that could reach in and hand it to you, but that would be an area that's not life and death that she still could not function when she has to have a mask and all the other people around her. In the high risk nursey I have to wear a mask and a cap frequently, which deters hearing. You have to yell at people sometimes to make them hear.

Q. You, I believe, work in the clinical area; is that correct? A. No, sir, I teach in the classroom. I'm a lead instructor, I teach in the classroom then I go to the clinical area.

Q. You actually supervise people while they are doing this clinical work; is that correct? A. Yes, I do.

Q. In this meeting, the clinical work was really what you were concerned about as far as Mrs. Davis' ability to do the work; isn't the true? A. Yes.

85 Q. Because everything that you had in that record would indicate that academically she could do the work; is that right? A. Now her grades were good except

for one course in biology which she made a C. We would prefer that our students have a B or better average in biology, but that one grade would not have stopped her from coming into the nursing program.

Q. What you are saying basically she was academically qualified and the reason that her application was rejected was because of her auditory problem; is that correct? A. Yes.

Q. Now isn't it true, Mrs. Berry, that the reason her application was rejected was because the college realized that it would take addition supervision if she were, in fact, admitted to the nursing program? A. It would take a great deal of supervision, but even with that much supervision, sometimes I have a one to four student ratio which is as good as any clinical instructor would ever have, but I still would not at times be able to stay with her. She is still going to have times when she is going to be alone and have to hear things herself. I wouldn't always be there with her and if you're thinking
86 of having one instructor per one student, I'm sure Dr. McCarter would have to close the college, there is no way that we can have that kind and she might, I don't know that she could even do it then if she had a one to one, I don't know.

Q. Because you have never met her; have you? A. No, I have never met her.

Q. Mrs. Berry, now you are aware, are you not, that Mrs. Davis is an LPN? A. Yes, sir, I am aware of that.

Q. And is it not true that a person who undergoes training to become and LPN has to do a certain amount of clinical work? A. Yes, sir, they do.

Q. Wouldn't the fact that she has a license as an LPN indicate to you that she has, in fact, accomplished

this clinical work for LPN? A. The clinical work for an LPN is not the same as the clinical work for an ADN, it goes much deeper in responsibility. An LPN is not left without the supervision of a registered nurse, so that she would always have a registered nurse with her as an LPN. She must work under the supervision of a registered nurse.

Q. Are you telling me, Mrs. Berry, that whenever I go into a hospital and you see these people come in with their name on a tag, they've got LPN after it,

87 they have to have an RN behind them every time they do something? A. They have an RN that gives them every assignment that they do and is responsible for everything they do. I am telling you that is exactly the way the law is written.

Q. Well, let me ask you this, are they actually required by the law to be on the scene when an LPN does a certain task? A. Are you saying do they have to go with an LPN to give a bath, no, I would hope not, but they would have to go with her to do anything that was critical or that they had any feelings that she might not be able to manage on her own. An LPN is not taught in the depth of responsibility that the ADN is.

MR' PATE: No further questions.

REDIRECT EXAMINATION

By Mr. Williamson:

Q. In responding to the questions of Mr. Pate about the information before you, I believe you stated that you were not personally acquainted with Mrs. Davis. Did you have the report of the audiologist, which has been already marked as Plaintiff's Exhibit Number 6 of Mr. Burton King? A. Yes, sir.

88 Q. Did you have this letter dated April 25, 1974,

which has been identified as Plaintiff's Exhibit 8 addressed to Mrs. Riggio? A. Yes, sir.

Q. Did you also have the information from the State Board of Nursing from Mrs. McKree? A. We called Miss McKree on the telephone. We did not have the letter from Miss McKree.

Q. Mrs. Berry, do you know of your own knowledge whether or not there is a period of time after graduation and before a nurse is licensed when they can actually do active duty type nursing? A. Yes.

Q. That is once a student graduates from college and before they are licensed, are there program where they can function say in the hospital after this until they are licensed? A. It's very limited what they can do. Until they become registered they do not assume responsibility for a unit to plan and administer care. They have to be registered before they can do that.

MR. WILLIAMSON: I have no further questions.

[Witness excused].

MR. WILLIAMSON: Dr. Moore.

Whereupon,

89 Dan Moore,

was called as a witness by and on behalf of the Defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. Would you state your name? A. Dan Moore.

Q. Dan, are you associated with Southeastern College? A. Yes, I am.

Q. In what capacity? A. I am dean for student development.

Q. Were you with the college back in the spring of

1974? A. No, I was not, I joined the college on May 27, 1974.

Q. Now are you familiar with the situation of Mrs. Frances Davis? A. Yes, I am.

Q. Do you recall whether or not you met in Dr. McCarter's office sometime during the month of June in response to her presence? A. Yes, sir, I did.

Q. Would you describe the circumstances surrounding that meeting, as you recall? A. I remember Dr. McCarter calling me and asking me to come to his office. When I got there, there were other people there, the

90 Davis were there and others that have been mentioned. Then I met with the group at that time.

Q. Now were you familiar with or did you have personal knowledge at that time of the situation of Mrs. Davis that she had not been admitted to the ADN program? A. I was aware at that time of the admissions list even though I was new.

Q. What transpired at the meeting, Dr. Moore? A. There was a discussion, the best of my recollection at that meeting, about Mrs. Davis not being admitted and the results was Dr. McCarter saying to Mrs. Davis that her application for admission would be reconsidered by the nursing faculty and also at that meeting and following that meeting I was instructed to coordinate getting in any additional materials that were needed.

Q. Do you recall at that meeting while Mrs. Davis and Mr. Davis was present whether or not Dr. McCarter had any conversation regarding the procedure she might follow in the event she was not satisfied with the decision at reconsideration? A. I do not recall the exact statements at that meeting. I can only assume based on his normal behavior that that would be true.

Q. What did you then do following the meeting

with respect to a review of her case? A. We

91 agreed to contact potential employers.

And at that time I made a telephone call to the persons at Southeastern General Hospital followed by a letter to those persons. I also wrote a letter to Miss McKree at the State Board of nursing, asked her specific questions about Mrs. Davis' licensing. We already had an audiologist's report. I did not contact him again.

Q. Dr. Moore, with reference to the letter which you wrote to Miss McKree, I hand you a paperwriting which has been identified as Plaintiff's Exhibit Number 13 purporting to be June 26, 1974 and ask you if this is a copy of the letter which you addressed to Miss McKree? A. Yes, it looks like that letter.

Q. I hand you another letter which has already been identified as Plaintiff's Exhibit Number 14 purporting to be a letter dated July 14, 1974 from Miss McKree to you, is this letter from Miss McKree in response to the letter you wrote her on June 26th? A. Yes, it is.

Q. Do you recall whether or not this letter dated July 14, 1974, was made available to the faculty committee in its reconsideration of Mrs. Davis' application? A. I believe that it was since my role was to gather the several pieces of information and turn them over to Mrs. Riggio for their consideration.

92 Q. Dr. Moore, would you, please, read that letter to us? A. "In response to your letter of June 26th, we reiterate our opinion given in our letter addressed to Mrs. Virginia Riggio on May 17. We, therefore, refer you again to that letter in which we enumerated several concerns, specifically, one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse (or to licensed practical nurse where appropriate) includes evidence that an ap-

plicant has no limitations physically, emotionally, or mentally to prevent the applicant to practice nursing after license without restriction of any kind on the license.

From the facts presented in Mrs. Riggio's letter and the audiologist's report of Mrs. Davis's hearing capacity, it is our opinion that Mrs. Davis has hearing limitations which could interfere with safely caring for patients. This very situation also in our opinion could be highly frustrating to Mrs. Davis. Again, from our letter to Mrs. Riggio of May 17, we do not believe on the basis of the facts we now have that Mrs. Davis would either be safe for herself or for patients, or for the faculty to pursue a nursing education program. We can not at this time predict eligibility or ineligibility for licensing examination should Mrs. Davis be enrolled and allowed to com-

93 plete the program some several years hence. We reiterate that each applicant for licensing examiantion must provide evidence that he or she is able, if licensed, to practice nursing as legally defined without any restrictions."

Q. Now following receipt of that letter and reconsideration by the faculty committee of Mrs. Davis' application, did you receive a report from the faculty committee about their reconsideration? A. I received a memorandum from Mrs. Riggio telling me that she had done the reconsideration and I believe she specifically cited the State Board's report and the Audiologist's report and she said that they were standing behind their original decision to reject Mrs. Davis.

Q. Do you recall the date you received that memorandum from Mrs. Riggio? A. July 24, 1974.

Q. I now hand you another paperwriting which has been identified as Plaintiff's Exhibit 18, which purports

to be a letter dated August 8th, 1974, by you to Mrs. Frances B. Davis. Is that the letter that you wrote Mrs. Davis following the meeting of the faculty committee and their reconsideration for application? A. Yes, it is.

Q. Now following the mailing of that letter, Dr. Moore, did you have any further contact with Mrs. Davis? Did she get back in touch with you?

94 THE COURT: What was that exhibit number, that last exhibit?

Q. 18, Your Honor.

Did you have any further contact by Mrs. Davis about the matter? A. I wrote Mrs. Davis on the 14th of August and sent her copies of the letters we had received because they were inadvertently omitted from the August 8th letter.

The next contact that I remember from Mrs. Davis was she came to my office the following Spring. I assume early May, because I have letters that I wrote on her behalf towards the end of May asking permission of the audiologist and Miss McKree to give her a copy of their letters. She came to see me to ask for copies of that material and she said she had misplaced hers and did not have them available. That was the next contact I had with her that I can recall.

Q. When was that Dr. Moore? A. My letter to Mrs. Davis followed her request is dated May 22nd which tells her that I am sending her a copy of the August 8th letter or the previous letter and then I wrote to Burton King and Mrs. McKree on the 23rd of May '75 asking their permission to give Mrs. Davis copies of their previous letters.

95 Q. Specifically, after your August 8th letter of 1974, did you have any request for additional appellate review

by Mrs. Davis? A. No, I did not hear from her.

Q. No request addressed to you to call a grievance committee together or anything of that type? A. No.

* * * *

96

CROSS EXAMINATION

By Mr. Diehl:

Q. Dean Moore, you were involved in some letters to and from a Mrs. Johnson at Southeastern Community Hospital; were you not, sir? A. That's true.

Q. And specifically a letter of July 1, 1974 was received, this being Plaintiff's Exhibit Number 15 from Mrs. Johnson. You wrote a letter of July 8th, which is Exhibit number 16, which was responded to on July 10th, and that is Plaintiff's Exhibit Number 17. In those series, in that series of letters you requested Mrs. Johnson to advise you as to whether or not she would employee Mrs. Davis in an RN capacity at Southeastern General; is that correct? A. Yes, it is, should she be registered.

Q. Yes, and Mrs. Johnson told you that she would; is that not also correct? A. She did specifically cite, reading from the letter, "Mrs. Davis could also handle the nigh assignment on postpartum and so forth," yes.

Q. In reference to the July 1st letter, the last paragraph states that she was of the opinion that she did not believe there was any area in which Mrs. Davis could not function in her present condition if she was allowed

97 to continue her education; is that not correct?

A. Her letter says, "I do not believe I can truthfully state she would not be able to function in any area of nursing."

Q. You then wrote to Mrs. Davis on the 8th of

August, this being Plinaitff's Exhibit Number 18 and in the letter of the 8th day of August set forth, the reasons for not accepting Mrs. Davis' application; is that correct?

A. That is true.

Q. And at that point the first and primary reason was that in your or in the college's opinion, she would not be licensed as an RN? A. She was told in the meeting with Dr. McCarter that her application would be reviewed and information would be collectedd regarding her licensing, regarding employment and also regarding her nursing faculty and those are the three points that are made in that letter.

Q. Of course, you wrote to Mrs. McKree on approximately the 26th of June; did you not?

A. Yes, I believe I did.

Q. And Mrs. McKree responded to you on the 14th of July in a letter which is Plaintiff's Exhibit Number 14? A. Right.

Q. And at that time she told you that she could not predict the outcome of licensing; is that correct?

98 A. That's true.

Q. Mr. Moore, Dean Moore, did you have any opportunity to converse individually with Mrs. Davis?

A. Only into the meeting in Dr. McCarter's office. I did not see Mrs. Davis other than that meeting and the next spring when she came back to my office.

Q. In the meeting in Dr. McCarter's office or attendent there to, did you at any time make a statement to her that you believed she ought to have an opportunity to prove herself in the educational system and the qualifications for the ADN program? A. I don't believe I made that statement.

Q. Dr. It is Dr. Moore, I assume, are you a PHD?

A. Yes.

Q. Dr. Moore, are you involved in the administration

or are you familiar with the administration of any Federal financial assistance?

THE COURT: That's stipulated. That's stipulated; isn't it?

MR. DIEHL: Yes, it is stipulated, Your Honor, I was asking if this gentleman himself were involved.

THE COURT: What would that have to do with it?

MR. DIEHL: I would ask, if your honor, please, if he is familiar with the non-discrimination against handicap clause that is involved in those grants.

99 THE COURT: Ask him the question. It doesn't make any difference what his answer is as far as I am concerned. A. Are you asking me?

Q. Yes? A. First the financial aid office and the director of the financial aid office reports to my office, so I am involved in it to that extent.

Q. Are you familiar with any non-discrimination against handicapped clauses in Federal assistance programs? A. I could not cite a specific act or law in which that is true. I am assuming that there probably are regulations to that effect.

Q. Now Dean Moore, are any programs for the college specifically designed to take into consideration or to aid people who are suffering from handicaps? A. The college does make facilities available for persons who are handicapped, for example, a student who is enrolled currently has classes scheduled on the first floor of a building because he is totally confined to a wheelchair.

Q. No curriculum has been developed that would, specifically, be designed to aid persons who are handicapped; is that correct, that you know of? A. If I understand you correctly, no.

MR. DIEHL: Thank you, sir.

MR. WILLIAMSON: Dr. Moore, let me ask you one more question.

100 REDIRECT EXAMINATION

By Mr. Williamson:

Q. Do you know of your own knowledge whether or not Mrs. Davis was, in fact, offered other avenues to study when she was not allowed to enroll in the nursing program? A. I do know that in my letter I suggested to her that should she desire to talk further with me or others, such as Mrs. Stocks, about alternatives, whether it be at Southeastern or another school, because we make a practice of attempting to assit students in going to other institutions. We did extend that offer sincerely.

MR. WILLIAMSON: Thank you.

[Witness excused].

MR. WILLIAMSON: Miss Shaw.

Whereupon,

C. PRICE SHAW,

was called as a witness by and on behalf of the Defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. Would you state your name, please, Ma'am? A. C. Price Shaw.

Q. Are you associated with Southeastern Community College? A. Yes, sir, I am.

101 Q. In what capacity? A. I am clinical instructor for both Freshmen and sophomore students in the ADN program.

Q. How long have you been with the college? A. Six years.

Q. Did you know Mrs. Frances Davis prior to the time in question when she enrolled or applied for enrollment in the ADN program at the college? A. Yes, sir.

Q. Where had you known her before? A. Practical nursing school at Robinson Tech.

Q. Is that Robinson Tech? A. Yes, sir.

Q. Now were you at Southeastern Community College at the time she came and enrolled–

THE COURT: Is that Robinson Tech?

A. Robinson.

Q. Were you at the Southeastern College in the fall of 1973 when she enrolled in that program that year?
A. I was employed at the college.

Q. And at that time were you on the nursing staff?
A. Yes, sir.

Q. Were you, at that time, involved with the first and second year students? A. Yes.

102 Q. In the same capacity as now? A. Yes.

Q. Did you have an opportunity to see or talk to Mrs. Davis during that period of time since you had known her previously? A. I saw her on a couple of occasions just as a student on campus.

Q. Miss Shaw, did you serve on the selection committee of nurses that convene in the month of May, 1974, for the first review of her application?
A. No, sir, not the first review.

Q. Did you serve on one of the committees?
A. Just in the faculty meeting when the faculty meeting was called.

Q. At that time were there other nurses from the college faculty present? A. All the nursing faculty.

Q. All the nursing faculty? A. Yes.

Q. What was the purpose of that meeting? A. To review the case of Mrs. Davis.

Q. You had known her? A. Yes, sir.

Q. Do you know of your own knowledge whether or not anybody else on the panel at that time had

known her previous to that? A. I don't think so.

Q. At that time did you have before you the various information that we've discussed in the trial of the case today, that is the audiologist's report, the report from Mrs. McKree and also the report from Burton King?
A. Yes, sir, I believe at that time Miss McKree was called by phone but the other reports were present.

Q. Did you at that time, based on the information available, vote to not admit Mrs. Davis to the ADN program? A. Yes, I did.

Q. Would you state your reasons, Ma'am?
A. My reasons for voting negative to accept her into the program was because I had had her as a practical nursing student and I was aware of the hearing impairment and I did not feel that it was safe for the patient or safe for the student to enroll into the ADN nursing program.

Q. Had you communicated that information to Mrs. Davis? A. Just today.

Q. Just today? A. Yes.

Q. Were you familiar with the admission criteria which were mentioned in the trial of the case today?

104 A. Yes, sir.

Q. And were you guided by the portions of the admissions criteria in determining her qualifiactions to be admitted to the program? A. Yes, sir.

Q. Miss Shaw, was Miss Davis treated any differently than other applicants in the program that year?
A. Not to my knowledge.

Q. I will ask you whether or not she was given the same objective evaluation that the other students were and that her rejection was based entirely upon the record that you had including her physical impairment?
A. To my knowledge, this is correct.

Q. Now would you tell me again, Please, Ma'am, what you actually do at the college? A. I am clinical instructor for both first year and second year ADN nursing students.

Q. So you are the clinical instructor which means you are with the student in the clinic or in the hospital; is that right? A. Yes.

Q. What areas of clinical instruction do you supervise? A. Medical surgical.

Q. Miss Shaw, how long have you been an instructor in the nursing program? A. At Southeastern or
105 total?

Q. Well, I really would like to know entirely. How long have you been at Southeastern first? A. Six years.

Q. Where were you before you went to Southeastern? A. I came from Robinson Tech which is a male PN program for one year. Previous to that, two years at the Diploma School at Southeastern General Hospital's School of Nursing and one year at the Mt. Surry School of Nursing.

Q. I'll ask you, Miss Shaw, whether or not it's been your experience that in order to properly evaluate the performance of a prospective nurse that it requires from a clinical standpoint an extended period of time in order to determine her suitability? A. I think I could say, yes, in most cases you have some time span there to determine the student's suitability.

Q. What was it about Mrs. Davis personally that in her record before you that made you feel that she could not serve in the clinical portion of this program? A. To me it was the hearing impairment.

Q. How would that have affected her as a member of your clinical team? A. Would you repeat the question, please?

Q. How would her hearing impairment that you were familiar with have affected her role in your clinical team?
106 A. As a student in the ADN program, we teach the student the principles that are used in the assessment of a patient's condition. They are taught the theory that goes along with the disease process and upon this their knowledge of principles and theory they have to make an assessment of the patient's condition. With this assessment they make a plan to meet the needs of the patient, then they implement the plan and I find that in collecting this theory and information in order to make a plan of care, that all senses are necessary, sight, hearing, touch are necessary in order to make an accurate and safe assessment.

Q. Did you know at that time that Mrs. Davis actually depended upon lip reading to communicate with people? A. Yes, sir, I did.

MR. WILLIAMSON: No further questions.

CROSS EXAMINATION

By Mr. Diehl:

Q. Miss Shaw, you first knew Mrs. Davis when you were a teacher at Robinson Tech? A. That's right.

Q. Were you also clinical director there? A. Yes, sir.

Q. So Mrs. Davis took her LPN clinical work under you direction? A. Yes, sir.

107 Q. And under your supervision? A. Yes.

Q. Now were you required there to provide any additional kind of supervisory detail to be able to work with Mrs. Davis because of her hearing impediment? A. Yes, sir, I did have to get her attention to where I could see her to communicate with her.

Q. Now, in other words, you are saying that at Robinson Tech you understood she had a hearing impair-

ment and you customized or modified the clinical program supervisory duties so as to be able to work specifically with her and make sure she followed the program and kep up with the instructions; is that right? A. Yes, and I did this may I add?

Q. Yes, Ma'am? A. I did this because at the level at which an LPN works, I deemed that it was safe for her to work at this level in the health field and therefore I put out an extra effort to help her meet this degree of success.

Q. Now Miss Shaw, at Robinson Tech, Mrs. Davis' grades grades were for the most part A's and B's; were they not? A. I do not remember but she did qualify in the period.

Q. And she became licensed as an LPN in 1967? A. Yes.

Q. Now in the clinical work at Robinson Tech, excuse me, at Southeastern in the ADN program, your
108 supervisory capacity consits for the most part, in some cases of working with say one supervisor to four students in the more demanding areas and sometimes one supervisor to eight to ten students in the less demanding areas; is that correct? A. Yes, sir.

Q. In every case the supervisors are responsible for the actions of the students; is that not also correct? A. Yes, sir.

Q. And in the critical areas such as the coronary unit or units of a comparable type, the students are really mere observes as to what takes place in those areas, is that not also correct? A. No, sir, they are given some responsibilities in this area.

Q. But they are not left in charge of the cardian unit though, are they? A. No, sir.

Q. There is always the regular hospital staff and/or

you in the supervisory capacity there? A. Yes, sir.

Q. During the time that they would be taking clinical instructions, they would be assigned to certain patients and do a work up on those patients; is that correct? A. Yes, sir.

109 Q. Providing, putting into practice or outlining in practical form the theory that they have learned from the classroom instruction as to what should be the proper care for that patient; is that correct? A. Yes, sir.

Q. Now again, at best, it's maybe a one instructor for four student basis; is that also correct? A. Yes, it could be.

Q. Miss Shaw, you never tried to device a supervisory program that would take care of someone with a handicap such as Mrs. Davis'; did you? A. No, sir, I did not.

Q. And you are not saying now that it could not be done to the place where it would be impossible to supervise Mrs. Davis by a modification of the present supervisory system that is used at Southeastern; are you? A. I think I am, let me explain, the difference in the LPN and Associate Degree Nursing, we have to allow the Associate Degree Nursing student leeway to collect data, make her assessment for the plan that is necessary to meet the patient's needs and we are evaluating that student on her ability to make this assessment because once the student is graduated we cannot go with them on through life in their practice to see that they make the correct judgments. So we do have to give the Associate Degree Student leeway to make her assessment
110 with minimal supervision on their part. Of course, we step in when we see that action is wrong that would

be detrimental to the patient, we step in at that time.

Q. You never tested Mrs. Davis to see whether or not she could observe the various signs and signals and be able to provide the outline for a program; did you? A. No, sir, I did not. I made my decision based upon the fact that I had known Mrs. Davis as a practical nursing student and I felt like I understood her hearing impairment and I did not feel like it would be safe for her, the patient or the instructor for her to be enrolled in the Associate Degree program.

MR. DIEHL: Thank you.

Questions by the Court:

Q. Let me ask you something, as to your instruction was in the first two years of the course; is that right? A. Yes, sir.

Q. Freshman and sophomore? A. Yes, sir.

Q. Was it a three year course? A. The Associate degree is a two year course.

Q. Two year course? A. Yes. The Hospital Diploma School is three year.

Q. You were the clinical instructor for each of those
111 years? A. That's right.

Q. After the first year I gather they go into the critical care? A. That's correct.

Q. Does that include the place they put you after they take you out of the operating room? A. The operating room, the coronary care.

Q. Intensive care? A. Intensive care.

Q. And so on? A. Yes.

[Witness excused].

MR. WILLIAMSON: Your Honor, we would like to recall Mrs. Hayes for two or three questions.

Whereupon,

ANNIE O. HAYES,

was called as a witness by and on behalf of the Defendant, and having been previously duly sworn, further testified as follows:

DIRECT EXAMINATION

By Mr. Williamson:

Q. Were you present in Dr. McCarter's office the day that Mr. and Mrs. Davis came to the college? A. No, I was not.

112 Q. Following that were you summoned as part of the faculty committee to reconsider the application of Mrs. Davis? A. Yes, I was.

Q. Did you participate in that particular meeting? A. Yes, I did.

Q. Do you recall approximately when it was? A. A. I don't recall the actual date.

Q. Now who was present with you? A. The other faculty members which was Mrs. Hoose, Mrs. Riggion, Mrs. Shaw and Mrs. Hill and, well, Mrs. Berry was there that day.

Q. And at that time did you have any knowledge of the fact that Dean Moore had written these various people to get additional information on Mrs. Davis' condition? A. Right now I don't recall that we discussed that too much, it was, you know, I don't actually remember the sequence of the various letters and so on.

Q. As a result of that meeting the faculty committee was reconvened? A. Right.

Q. Would you tell us what, if anything, the committee did at that time with reference to her application? A. As I recall I think that one of the—my main concern after I had done an initial interview and then at this time I did look at the other information

which I had not done before that we had. My concern
113 was in Mrs. Davis' ability to function safely as a student in the clinical area and my basis for questioning this and also my vote not to accept her as a student, even after reconsidering the information was as I mentioned before that we carry malpractice insurance and we are responsible for the student and what she does in the clinical area and I did not think in the areas in which I worked with students that I could be responsible for Mrs. Davis.

Q. Mrs. Hayes, clinical experience comes from direct patient– A. Right?

Q. –nurse relationship. In other words, in order to get clinical experience, you work directly with patients? A. Yes, you do.

Q. Was this the area that you felt Mrs. Davis could not function because of this hearing problem that has already been testified to? A. Right and one of the areas that I was thinking about was where you have a patient or you may have two or three patients, you may have machinery and equipment, it could be a noisy area and I know that sometimes it's difficult to hear in these areas and to follow through with everything that's going on even if you have good hearing and this was
114 one of the things that I felt that she had, you know, it would just not be fair to her to subject her to this.

MR. WILLIAMSON: No further questions.

CROSS EXAMINATION

By Mr. Diehl:

Q. Did you ever consider working in a supervisory capacity with Mrs. Davis on a one on one basis? A. No, I still would not accept the responsibility.

MR. DIEHL: No other questions.

[Witness excused].

MR. WILLIAMSON: That's the defendant's evidence.

THE COURT: Anything in reply?

* * * * *

MR. DIEHL: No, Your Honor.

* * * * *

PLAINTIFF'S EXHIBIT # 1

REPORT CARDS OF FRANCES DAVIS FROM FAYETTEVILLE (ROBESON) TECH FOR L.P.N. COURSE

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nursing — Quarter: 1st

Course Number: PN 1102 — Credit Hours:

Final Grade: C — Contact Hours: 84

Instructor: Sue P. Shaw

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nursing — Quarter: 1st

Course Number: PN 1101 — Credit Hours:

Final Grade: A — Contact Hours 30

Instructor: Sue P. Shaw

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nursing — Quarter: 1st

Course Number: PN 1103 — Credit Hours:

Final Grade: B + — Contact Hours 125

Instructor: Sue P. Shaw

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Pract. Nursing Quarter: 1st

Course Number: PN 1104 Credit Hours:

Final Grade: C - Contact Hours: 24

Instructor: Sue P. Shaw

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nursing Quarter: 1st

Course Number: Clinical Nursing Credit Hours:

Final Grade: C + Contact Hours: 60

Instructor: Sue P. Shaw

100a

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nursing Quarter: 1st

Course Number: Eng. 1101 Credit Hours:

Final Grade: C Contact Hours: 33

Instructor: Virginia B. Smith

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nursing Quarter: 2nd

Course Number: PN 1107 (Med. Surg.) (I) Credit Hours: 8

Final Grade: B - Contact Hours: 230

Instructor: Sue P. Shaw

101a

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S **FULL NAME:** **Davis, Frances B.**

Curriculum: **Pract. Nursing** **Quarter:** 2nd

Course Number: PN 1105 (Nutrition) **Credit Hours:** 4

Final Grade: B - **Contact Hours:** 48

Instructor: Sue P. Shaw

102a

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: **Davis, Frances B.**

Curriculum: **Prac. Nursing** **Quarter:** 2nd

Course Number: Math **Credit Hours:** 3

Final Grade: C **Contact Hours:** 33

Instructor: Thomas E. Williams

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: **Davis, Frances B.**

Curriculum: **Prac. Nursing** **Quarter:** 2nd

Course Number: PN 1106 (N/Skills) (II) **Credit Hours:** 3

Final Grade: C + **Contact Hours:** 56

Instructor: Sue P. Shaw

103a

STUDENT'S FULL NAME: **Davis, Frances B.**

Curriculum: **Prac. Nursing** **Quarter:** 3rd

Course Number: PN 1113 (Geriatrics) **Credit Hours:** 4

Final Grade: A **Contact Hours:** 72

Instructor: Sue Shaw

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: **Davis, Frances B.**

Curriculum: **Pract. Nursing** Quarter: 3rd

Course Number: PN 1114 (Ment. Heal) Credit Hours: 3

Final Grade: B + Contact Hours: 24

Instructor: Sue P. Shaw

104a

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: **Davis, Frances B.**

Curriculum: **Prac. Nursing** Quarter: 3rd

Course Number: PN 1112 (Med Surg.) (III) Credit Hours: 6

Final Grade: B + Contact Hours: 144

Instructor: Sue Shaw

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: **Davis, Frances B.**

Curriculum: **Prac. Nursing** Quarter: 3rd

Course Number: PN 1117 (Communicab-(le Disease) Credit Hours: 2

Final Grade: B + Contact Hours: 24

Instructor: Sue P. Shaw

105a

STUDENT'S FULL NAME: **Davis, Frances B.**

Curriculum: **Prac. Nursing** Quarter: 3rd

Course Number: PN 1110 (Med. Surg.) (II) Credit Hours: 2

Final Grade: B Contact Hours: 46

Instructor: Sue Shaw

FAYETTEVILLE TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Pract. Nursing **Quarter:** 3rd

Course Number: PN 1111 (Drug Adm.) **Credit Hours:** 2

Final Grade: A - **Contact Hours:** 39

Instructor: Sue P. Shaw

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ROBESON COUNTY TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nurs. QUARTER: 4th

Course Number: PN 1112 Med Surg. Credit Hours: 1

Final Grade: 92 B + Contact Hours: 72

Instructor: Sue P. Shaw, R.N.

ROBESON COUNTY TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nurs. Quarter: 4th

Course Number: PN 1108 Nurs. Childr. Credit Hours: 5

Final Grade: 93 A - Contact Hours: 132

Instructor: Sue P. Shaw, R.N.

107a

ROBESON COUNTY TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nurs. **QUARTER: 4th**

Course Number: PN 1116 (Voc. Adj.) **Credit Hours:** 2

Final Grade: 91 B + **Contact Hours:** 16

Instructor: Sue P. Shaw, R.N.

ROBESON COUNTY TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nurs. Quarter: 4th

Course Number: PN 1109 Nurs. Mother Credit Hours: 5

Final Grade: 93 A - Contact Hours: 132

Instructor: Sue P. Shaw, R.N.

ROBESON COUNTY TECHNICAL INSTITUTE -- REPORT CARD

STUDENT'S FULL NAME: Davis, Frances B.

Curriculum: Prac. Nurs. Quarter: 4th

Course Number: PN 1114 Family Units Credit Hours: 1

Final Grade: 93 A - Contact Hours: 12

Instructor: Sue P. Shaw, R.N.

FINAL QP AVERAGE 3.0

PLAINTIFF'S EXHIBIT NO. 2

CERTIFICATE NO. 9581 of N.C. BOARD OF NURSING issued to Plaintiff.

North Carolina Board of Nursing

CERTIFIES THAT

FRANCES BURCHETTE DAVIS

has this day been licensed according to the laws of the State of North Carolina relating to nursing, and is entitled to practice as and to hold and use the title of

Licensed Practical Nurse

In Witness Whereof, we the undersigned have hereunto set our hands and caused the seal of this Board to be affixed this the 6th *day of* November 19 67

Certificate No. 9,581

Elaine C. Heins
CHAIRMAN

Jessie D. Ferris
SECRETARY

PLAINTIFF'S EXHIBIT NO. 3

ADMISSION CRITERIA FOR A.D.N. PROGRAM AT COLLEGE

SOUTHEASTERN COMMUNITY COLLEGE
ADMISSION CRITERIA FOR ASSOCIATE DEGREE NURSING PROGRAM

Prospective students must meet the following criteria in order to qualify for admission to the Associate Degree Nursing Program at S.C.C. This program can be completed in two years or in three years at Southeastern Community College. These criteria are listed below.

TWO-YEAR PROGRAM

High School Graduate

High School Subjects Required:
- Biology
- Chemistry
- Algebra

These subjects can be taken at S.C.C. prior to entrance into the Associated Degree Nursing Program. Advanced Biology recommended when possible.

Class Standing

Top half of graduating class

College Guidance & Placement Test Scores

Year 2000 - National percentile of 36
Letter Group - National percentile of 42

If the student achieves one of the required scores but not the other, he/she could still qualify if the score on the other test does not ball below the 25th percentile.

Consideration will be given to students over 30 years of age who achieve low scores on these tests.

Interview

Each prosepctive student will be interviewed by the Nursing Faculty.

Application Folder

Student's application folder in the Student Development Center

should be completed by March, thus ensuring early consideration for admission to the class beginning the following September.

SELECTION PROCESS

Student's application folder must include the following:
- High school record
- College transcripts, if previously attended another college
- Suitability for Nursing forms - 2 required
- Medical record - serious consideration given to existing health problems
- Dental record
- Interview guides
- College Guidance & Placement Scores

See catalogue for regular two-year program

THREE-YEAR PROGRAM

New high school graduates should give consideration to enrolling in the three-year nursing stretch-out program and completing the related subjects prior to being considered for the nursing program. These students are given first consideration in the selection process each year.

High School Graduate

Same requirements as listed for two-year program

Class Standing

Top half of graduating class

College Guidance & Placement Test Scores

Those students enrolled at S.C.C. in the three-year program should have admission scores on the College Guidance & Placement Test of:
- Year 2000 - National percentile of 20
- Letter Groups - National percentile of 20

Condsideration will be given to students over 30 years of age who achieve low scores on these tests.

College Grade Point Average

Those students enrolled at S.C.C. in the three-year program are expected to achieve and maintain a 2.5 Grade Point Average.

Interview

Nursing faculty interview required.

Selection Process

Students enrolled in the three-year program will be evaluated at the beginning of spring quarter.

Application folders must include:

- High school record
- College transcripts - S.C.C. & transfer
- Suitability for Nursing forms - 2 required
- Medical record - serious consideration given to existing health problems
- Dental record
- Interview guides
- College Guidance & Placement Test Scores
- S.C.C. grades achieved fall and winter quarters
- Those students who may have enrolled for the first time winter quarter will be evaluated at the end of spring quarter.

Three-year students are given first consideration in the selection process each year.

Sample Stretch Out Program

Fall Quarter

Eng 101 Freshman English	4
Psy 101 Psychology of Learning	2
Bio 101 General Biology	4
Ped 101 Physical Education	1
Nur 101 Introduction to Nursing	1
	12 credits

Winter Quarter

Eng 102 Freshman English	3
Psy 201 Psychology	5
Ped 102 Physical Education	1
Bio 204 Anatomy & Physiology	5
Nur 101 Introduction to Nursing	1
	15 credits

Spring Quarter

Eng 103 Freshman English or	3
Eng 211 Public Speaking	5
Bio 205 Anatomy & Physiology	5
Soc 201 Introduction to Sociology	5
Ped 103 Physical Education	1
Nur 102 Introduction to Nursing	1
	15 or 17 credits

Subject to revision

PLAINTIFF'S EXHIBIT NO. 4

APPLICATION FOR ADMISSION OF PLAINTIFF TO ASSOCIATE DEGREE NURSING PROGRAM AT SOUTHEASTERN COMMUNITY COLLEGE

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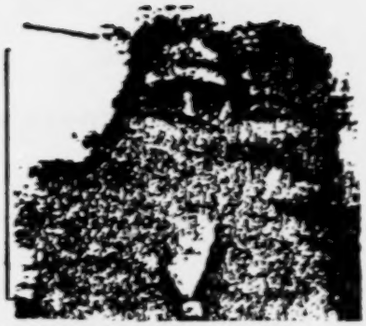
DO NOT WRITE IN THIS SPACE

SOUTHEASTERN COMMUNITY COLLEGE
WHITEVILLE, NORTH CAROLINA 28472

APPLICATION FOR ADMISSION

To the applicant: Type or print in ink. All questions must be completely and accurately answered. Use full legal name as it appears on birth certificate or court order.

P/T
#4



SECTION I BIOGRAPHY

Name (Last)	(First)	(Middle/Maiden)
Davis	Frances	Burchette

Address (Permanent) Street and Number/RFD	City
409 Friendly Street	Fairmont

Telephone	County	State	Zip
919-628-1558 919-628-4531	Robeson	North Carolina	28340

Date of Birth: Month Day Year Born	Sex: Male	Female	Marital Status: Married	Single	Divorced	Widow(er)
August 31 - 1932	☐	☒	☒	☐	☐	☐

Social Security Number	Veteran Yes	No	Citizenship: United States: ☒ Yes: ☐ No. If no, citizen of
242-42-3442	☐	☒	

SECTION II GENERAL INFORMATION

Check Term you plan to enter: ☐ Fall: ☐ Winter: ☐ Spring: ☒ Summer, 19 73

Indicate your planned major area of study. If undecided, so indicate.

Nursing

Do you plan to board at an address other than your permanent one while attending S. C. C.? ☐ Yes: ☒ No: ☐ Undecided

Occupation or professional plans upon graduation:

Public Health Nursing

Have you taken the Comparative Guidance and Placement Test (CGP) at S. C. C.? ☐ Yes: ☒ No.

When did or when do you plan to take it?

waived I

SECTION III SECONDARY SCHOOL INFORMATION

Name of High School last attended: Philadelphus High School

Have principal or counselor send copy of secondary school transcript.

FOR N. C. RESIDENT:
This is to certify that my parents or I will have been legal residents of North Carolina for the 12 months immediately preceding the date on which I intend to enroll at Southeastern Community College.

Frances B. Davis
Signature

FOR COASTAL PLAINS RESIDENT:
This is to certify that my legal residence is in the Coastal Plains area of South Carolina or Georgia.

Signature

FOR NON-N. C. RESIDENT:
In applying for admission to Southeastern Community College, I acknowledge my status as an out-of-state student.

Signature

I certify that the above information is complete and correct to the best of my knowledge and belief. I further understand that falsification or failure to supply the correct information may lead to disqualification of my application and/or charges under the Code of Conduct.

I further understand that my application for admission is not complete until my high school transcript and college transcripts, my photograph, and a completed medical and immunization record signed by a physician have been received by the college.

Date 3-5-73 Signature (in ink) Frances B. Davis

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Pre-entrance Medical Record

School of Nursing Southeastern Community College

Address [illegible] N.C. 28472

The medical examiner is requested to make a careful physical examination. Otherwise, defects found after admission may lead to the rejection of the applicant.

Name of applicant (Mrs. Mr. Dr.) Davis (Last name) Frances (First name) B. (Middle name)

Date of birth Aug (Month) 31 (Day) 1932 (Year) Weight 195 Height 69"

A. Medical History of Family, with Special Reference to Chronic Illness and Mental or Nervous Disorders

none

B. Medical History of Applicant

1. Any hoarseness, cough, or shortness of breath on moderate exertion no
2. Tuberculosis no Type
3. Epilepsy, any mental disorder, emotional instability, or headache no
   Treatment, if any
4. Rheumatism or rheumatic fever no
5. Heart disease no
6. Hay fever, asthma, eczema, or other allergic reaction including drug reactions none
   Is treatment required? no If so, specify
7. Menstruation: Regular ✓ Irregular Pain
   Is bed rest required? no If so, how long

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8. Childhood diseases measles, mumps
9. Other diseases no
10. Operations D + C (one)
11. Injuries none

C. Physical Examination

1. Condition of:
   Eyes Nystagmus on lateral gaze - moved. Sinuses negative.
   Ears some decrease in hearing Skin clear -
   Throat (adenoids and tonsils) normal Thyroid normal -
   Nose Negative
2. Chest measurements in full expiration After full inspiration
   Lungs clear - Abnormal signs normal
3. Heart: Size normal Sound normal Murmurs none Rhythm regular
   Rate and rhythm of pulse 72 regular Blood pressure 130/80
4. Abdomen: Scars none Tenderness none Palpable masses none
5. Urine: Quantity Sp. gr. 1.015 Protein negative Sugar negative
6. Posture excellent

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7. Condition of feet and arches excellent

8. Has applicant any handicaps? State nature Nil

D. Immunizations and Tests (Complete as directed by the school)

Blood Test — Serology	Date	Diphtheria Toxoid (Toxin-antitoxin)	Date	Dosage
	Result		Oct 70	
Tuberculin Test	Date 2-28-73			
	Reaction			
Schick Test	Date	Typhoid-Paratyphoid Vaccine		
	Reaction			
Smallpox Vaccine	Date			
	Reaction			
Tetanus Toxoid	Date Oct 70	Poliomyelitis Vaccine	1966	
	Dosage			
Other (Specify)	Date			

E. Recommendations

1. Do you consider the applicant mentally and physically able to undertake the program in nursing? Yes
2. Do you recommend the applicant for admission to the school? Yes
3. (a) Are you her (his) family physician? Yes (b) How long have you known the applicant? 14 yrs

I have this day given Mrs. Frances B. Davis a careful physical examination and found her (him) in excellent health.

After this examination, do you believe that Mrs Frances B Davis health history and physical examination findings justify her (him) in undertaking the program in professional nursing? Yes

Remarks:

Date 2-28, 1973

Signature C Duncan M.D.

Address Fairmont, N.C.

Pre-entrance Dental Record

School of Nursing Southeastern Community College

Address White Lake, North Carolina, 28472

This is to certify that Mrs Frances Davis

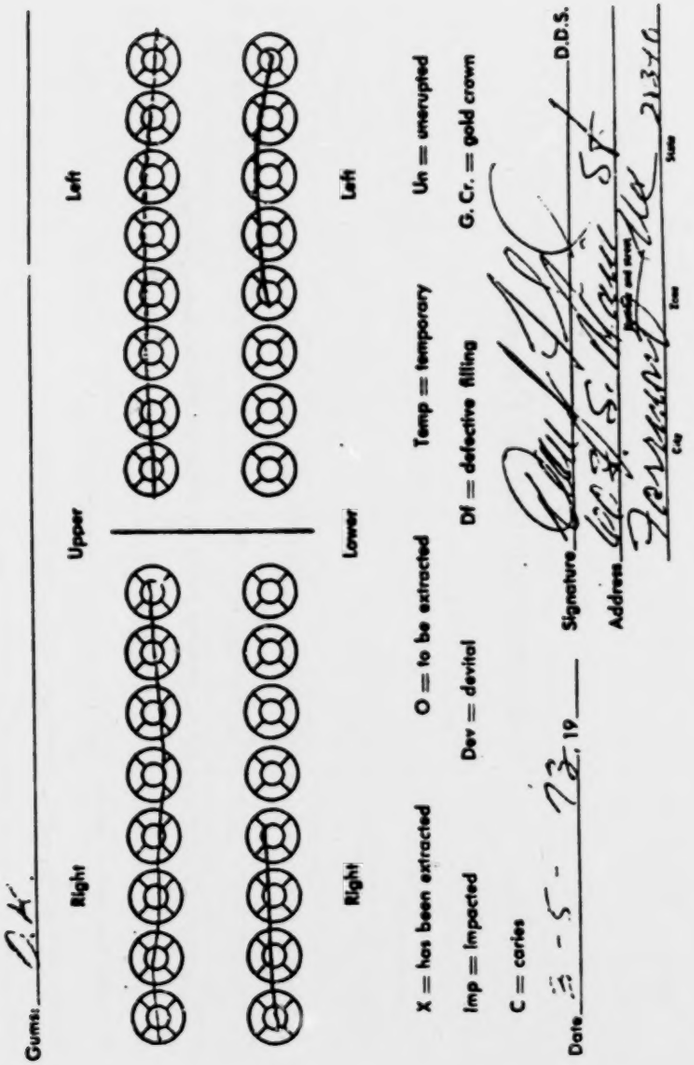
on 5 (Month) 5 (Day) 73 (Year) came to me for an examination of her (his) teeth which I found to be in good condition. I have since then given the necessary treatment.

How often are teeth examined Yr

Care of mouth: good ✓ average _____ poor _____

Teeth: good _____ average ✓ poor _____

Occlusion: good _____ average ✓ poor _____



PLAINTIFF'S EXHIBIT NO. 5

LETTER OF R.C. NORRIS, Registrar of College indicating acceptance for 73-74 school year.

SOUTHEASTERN
COMMUNITY
COLLEGE
WHITEVILLE, NORTH CAROLINA

August 17, 1973

Mrs. Frances Burchette Davis
409 Friendly Street
Fairmont, NC 28340

Dear Mrs. Burchette:

It is our pleasure to notify you that you have been accepted for admission to Southeastern Community College for the 1973-1974 school year. It is our understanding that you would like to enter the Associate Degree Nursing Program in September of 1974. If so, your progress will be evaluated at the end of this year to determine your acceptance into the nursing program. If you are accepted, your program will still require two additional years after this year.

We warmly welcome you to the college; and, in the event you have further questions pertaining to the college, we hope that you will contact us.

Later this month you will be receiving information concerning orientation and registration. If you have any questions or if your plans change, please contact us.

Sincerely,

Roland C. Norris

Roland C. Norris
Registrar

mg

PLAINTIFF'S EXHIBIT NO. 6

MEDICAL REPORT OF BURTON B. KING, AUDIOLOGIST, DUKE UNIVERSITY MEDICAL CENTER.

DUKE UNIVERSITY MEDICAL CENTER

Center for Speech & Hearing Disorders

Address: 409 Friendly Road
Fairmont, N.C.

Husband: A. Ray Davis

Davis, Frances B.

F 4 8785

DOB:8-31-32

DOE: 4-18-74

This patient was seen in the Center for Speech and Hearing Disorders for hearing evaluation and hearing aid evaluation. She was referred to us by Dr. C.G. Pantelakos, Otolaryngologist, in Fayetteville, North Carolina. The otological examination had been performed by Dr. Pantelakos.

According to the patient, she has had a hearing loss on both ears for many years. She stated that her father and her two sisters have significant hearing losses. Furthermore, Mrs. Davis indicated that she had worked in a dry cleaning plant for approximately three years.

The hearing evaluation indicated a bilateral moderately severe sensorineural hearing loss. The audiologist obtained a 52 dB speech reception threshold, 68% speech discrimination on the right ear; and a 52 dB speech reception threshold, 42% speech discrimination on the left ear. These test results indicated that Mrs. Davis suffers from a significant hearing loss and has a better understanding of speech on her right ear. Because of the significant bilateral hearing loss, it was determined that Mrs. Davis could be a satisfactory candidate for a hearing aid.

The hearing aid evaluation procedure consisted of evaluating these patients present hearing aid, and ear level hearing aid, purchased from a mail order house, and new hearing aids from the hearing aid inventory in the Speech and Hearing Center. The hearing aid evaluation was performed in a controlled free field testing environment. The hearing aid evaluation showed that the Lloyd's hearing aid provided little if any help for Mrs. Davis. Therefore, it was recommended that the Lloyd's hearing aid, her present hearing aid,should be replaced. Mrs. Davis performed best with a Beltone Andante (red dot), ear level hearing aid, with the aid worn on her right ear. The Beltone instrument provided a 24 dB speech reception threshold, 62% speech discrimination. It should be noted that Mrs. Davis presents a challenging case for hearing aid use. She has a significant hearing loss with a marked speech discrimination loss and has a severe tolerance problem for amplified sound. Considering these factors, her performance with the Beltone Andante hearing aid should be interpreted as satisfactory. Therefore, the Beltone instrument was recommended for her. In addition to the hearing aid, she should be provided with a custom made ear mold for her right ear.

Although Mrs. Davis performs adequately with the new hearing aid, she was encouraged to continue to use her vision to supplement her hearing. She relies on her vision in helping her understand the speech of those with whom she is associated. The hearing aid improves her hearing level to the outer limits of normal hearing levels.

Thank you for this referral.

Burton B. King
Audiologist

Dr. Kunze
Speach & Hearing Clinic
Duke Hospital
Durham, N.C. 27710

April 23, 1974

Dear Dr. Eunze:

Mrs. Frances Davis of 409 Friendly St., Fairmont, N.C. states that she was seen and examined by you this past week. She has applied for admission to our Associate Degree Nursing Program.

We would appreciate a statement from you regarding her hearing tests with specific information as to whether or not her hearing loss will interfere with her functioning in a safe manner as a student nurse and eventually a graduate nurse.

Our major concern is her apparent inability to hear someone speaking behind her and to the side and she has to ask to have statements repeated a number of times in a face to face conversation.

We would like to know if her hearing test with the audiometer would place her within the normal speech range and also whether or not her hearing loss can be corrected.

An early reply would be appreciated.

Sincerely,

Virginia D. Riggio
Director, Nursing Programs

VDR/nw

PLAINTIFF'S EXHIBIT NO. 7
LETTER OF VIRGINIA D. RIGGIO TO DR. KUNZE, DUKE HOSPITAL.

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Duke University Medical Center
DURHAM, NORTH CAROLINA

DEPARTMENT OF SURGERY
DIVISION OF OTOLARYNGOLOGY

April 25, 1974

POSTAL CODE 27706
TELEPHONE 919-684-6111

Virginia D. Riggio
Director, Nursing Programs
Southeastern Community College
Whiteville, North Carolina 28472

Dear Miss Riggio:

Dr. Kunze has given me your April 23rd letter concerning Mrs. Frances Davis for reply.

She was seen in the Center for Speech and Hearing Disorders for hearing evaluation and hearing aid evaluation and selection. The hearing test indicated a bilateral, sensori-neural hearing loss. She has a moderately severe hearing loss on the right ear and a severe hearing loss on the left ear. In addition to the significant bilateral hearing loss, she has a speech discrimination loss. Stated differently,she has remarkable difficulty in understanding speech because of the distortion in her hearing. However, she understands speech better on the right ear. Thus, that is the ear on which she should wear her hearing aid.

The hearing aid which she has been wearing for some time was an instrument that she received from a mail order company. It was my opinion that this instrument provided little if any help for her. Therefore, a new Beltone Andante (red dot)hearing aid, was recommended for her. This instrument provides her with a significant improvement in her hearing which approaches normal hearing levels. In other words, while she is wearing the hearing aid, she should be able to hear a talker almost

PLAINTIFF'S EXHIBIT NO. 8
LETTER OF BURTON B. KING, AUDIOLOGIST, to VIRGINIA RIGGIO

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as well as a person would who has normal hearing. However, to effectively understand speech of that talker she must use her vision to supplement her hearing. It is my opinion that she is an excellent lip reader and performs well above what one would expect for a person with this degree of hearing impairment.

To answer your specific questions, I should state that Mrs. Davis does not possess normal hearing. However, with a hearing aid on her right ear she is very skillful in communicating with other people. If she is allowed to see the talker and use her vision to aid her in interpreting the speech of others, she can perform satisfactorily in most listening situations. While wearing the hearing aid, she is well aware of gross sounds occurring in the listening environment. However, she can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker.

I have attempted to describe to you in a few words my impression of Mrs. Davis and her hearing ability. If I may be of further service to you or to Mrs. Davis please contact me.

Sincerely yours,

Burton B. King
Audiologist

BBK:hh

PLAINTIFF'S EXHIBIT NO. 9

LETTER OF J.A. SCHMIDT, DIRECTOR OF ADMISSIONS, dated 5/6/74, to PLAINTIFF advising she did not qualify for acceptance into the ASSOCIATE DEGREE NURSING PROGRAM.

Southeastern Community College
P.O. BOX 151 WHITEVILLE N.C. 28472 PHONE 910 642 7141

May 6, 1974

Mrs. Frances Davis
409 Friendly Street
Fairmont, NC 28340

Dear Mrs. Davis:

As a part of our selection process, you were requested to have an evaluation of your hearing by a qualified Ear, Nose, and Throat Specialist.

Serious consideration has been given to the results of your hearing evaluation that was conducted at the Center for Speech and Hearing Disorders at Duke, and I regret to inform you that you do not qualify for acceptance in the Associate Degree Nursing Program at Southeastern Community College.

If you have any further questions, please come in and speak with Mrs. Riggio.

Sincerely,

James A. Schmidt

James A. Schmidt
Director of Admissions

JAS:pb

PLAINTIFF'S EXHIBIT NO. 10

LETTER OF VIRGINIA RIGGIO TO MISS MARY McREE, EXECUTIVE DIRECTOR, NORTH CAROLINA BOARD OF NURSING, dated May 14, 1974

SOUTHEASTERN
COMMUNITY
COLLEGE

MAY 16 11 24 AM '74
WHITEVILLE, NORTH CAROLINA 28472

May 14, 1974

Miss Mary McRee, R.N.
Executive Director
North Carolina Board of Nursing
P.O. Box 2129
Raleigh, N.C. 27602

Dear Miss McRee:

Enclosed find letters regarding Mrs. Frances Davis that you had requested in our phone conversation of May 13, 1974.

A statement from the Board of Nursing will be appreciated.

Yours truly,

Virginia D. Riggio

Virginia D. Riggio
Director, Nursing Programs

VDR/nw

Enclosures

PLAINTIFF'S EXHIBIT NO. 11

LETTER FROM MISS McREE, EXECUTIVE DIRECTOR, NORTH CAROLINA BOARD OF NURSING, TO VIRGINIA RIGGIO, dated May 17, 1974.

North Carolina Board of Nursing

P. O. BOX 2129

RALEIGH, NORTH CAROLINA

MARY McREE, R. N.
EXECUTIVE DIRECTOR

TELEPHONE
AREA CODE 919—858-5035

May 17, 1974

Miss Virginia D. Riggio
Director
Nursing Programs
Southeastern Community College
Whiteville, North Carolina 28472

Dear Miss Riggio:

This is in response to your request by telephone on May 13 and restated in your letter of May 14, for our opinion as to the safe involvement of Mrs. Frances Davis in the nursing program considering her hearing difficulty.

We concur with your opinion as stated on the telephone, that Mrs. Davis's hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, or by a license as LPN. Moreover, we would question the advisability of you and the faculty's assuming responsibility for Mrs. Davis's involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with Mrs. Davis's hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs.

The basis for our opinions is found in the audiologist's response to you from Duke University on April 25, and the relationship of this response to expectations of nurses in patient care, "If she is allowed to see the talker and use her vision to aid her in interpreting the speech of others she can perform satisfactorily in most listening situations. While wearing the hearing aid, she is well aware of gross sounds occurring in the listening environment; however, she can only be responsible for speech spoken to her when the talker gets her attention and allows her to look directly at the talker."

Both you and I can identify innumerable patient care situations in which this lady's abilities as defined in the quoted paragraph would be inadequate to respond to the patient needs; in fact, it would be inadequate for her probably to identify all of the patient's needs for which she would be accountable or even to pick up some clues to situations that could be quite critical to the point of life, death, situations.

Certainly, it must be frustrating to an individual, as Mrs. Davis, who according to your identification is very intelligent and has a determined interest to pursue nursing not to be able to fulfill this goal; however, how much more frustrated she might become should she be enrolled in the program and experience a different kind of trauma in terms of missing some very important clues in patient care, or even in experiencing a wrong measure of patients needs.

I believe that you indicated on the telephone that there are other career avenues open to her which would capitalize upon her abilities and in which the hearing disability would not be a significant barrier as it could be in

nursing. We would urge the college in counselling Mrs. Davis to alter her career goal, as we do not believe, on the basis of facts we have now, that Mrs. Davis would either be safe for herself, or for patients, or for faculty to pursue a nursing education program.

We will be interested to know what route Mrs. Davis does elect in terms of an alternate option.

Sincerely,

Mary McRee

(Miss) Mary McRee, R. N.
Executive Director

McR:ep

PLAINTIFF'S EXHIBIT NO. 12

REPORT OF GRADES FOR 73-74 SCHOOL YEAR - SOUTHEASTERN COMMUNITY COLLEGE.

DAVIS, Frances B. Date of Admission: Fall, 1973

FALL, 1973

Title of Course		Grade	Qtr. Hrs.	Qual. Pts.
FRESHMAN ENGLISH	Eng 101	C	4	8
GENERAL BIOLOGY	Bio 101	C	4	8

WINTER, 1973

Title of Course	Grade	Qtr. Hrs.	Qual. Pts.
BIO 204	B	5	15
PSY 201	B	5	15
ENG 102	B	3	9

SPRING, 1974

Title of Course	Grade	Qtr. Hrs.	Qual. Pts.
BIO 205	C	5	10
ENG 103	B	3	9
PSY 206	C	3	6

PLAINTIFF'S EXHIBIT NO. 13

LETTER FROM DEAN MOORE TO MISS MARY McREE, STATE BOARD OF NURSING

June 26, 1974

Miss Mary McRee, R. N.
Executive Director
North Carolina Board of Nursing
P. O. Box 2129
Raleigh, North Carolina 27600

Dear Miss McRee:

At the request of Mrs. Frances Davis, we are reconsidering her application for admission to our Associate Degree Nursing Program. You responded to our concerns about Mrs. Davis' application by letter on May 17, 1974 to Miss Virginia Riggio.

Our question at this time is as follows: If Mrs. Davis were admitted and subsequently successfully completed our program, would her hearing difficulty (as described in Mr. Burton King's report and referred to in your May letter) prevent her from being licensed as an R.N. by the North Carolina Board of Nursing? Your response to this question will be carefully considered as further decisions are made relative to Mrs. Davis' application.

Thank you very much for your assistance.

Sincerely yours,

Dan W. Moore
Dean for Student Development

DWM/mg

PLAINTIFF'S EXHIBIT NO. 14

LETTER FROM MISS MARY McREE, STATE BOARD OF NURSING TO DEAN MOORE

North Carolina Board of Nursing

P. O. BOX 2129

RALEIGH, NORTH CAROLINA

July 14, 1974

[illegible], R. N.
[illegible] DIRECTOR

TELEPHONE
AREA CODE 919-[illegible]

138a

Mr. Dan W. Moore
Dean for Student Development
Southeastern Community College
Whiteville, North Carolina 28472

Dear Mr. Moore:

In response to your letter of June 26, we reiterate our opinion given in our letter addressed to Miss Virginia Riggio on May 17. We, therefore, refer you again to that letter in which we enumerated several concerns. Specifically, one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse (or to licensed practical nurse where appropriate) includes evidence that an applicant has no limitations, physically, emotionally, or mentally, to prevent the applicant from practicing nursing, after licensure, without restriction of any kind on the license. From the facts presented through Miss Riggio's letter and the audiologist's report of Mrs. Davis's hearing capacity, it is our opinion that Mrs. Davis has hearing limitations which could interfere with her safely caring for patients. This very situation, also in our opinion, could be highly frustrating to Mrs. Davis.

Again, from our letter to Miss Riggio of May 17 "...we do not believe on the basis of facts we have now that Mrs. Davis would either be safe for herself, or for patients, or for faculty to pursue a nursing education program."

We cannot, at this time, predict eligibility or ineligibility for the licensing examination should Mrs. Davis enroll in, and be allowed to complete the program some several years hence.

139a

We reiterate that each applicant for the licensing examination must provide evidence that he/she is able, if licensed, to practice nursing as legally defined without any restriction.

Sincerely,

[illegible]

(Miss) Mary McRee, R.N.
Executive Director

MM:EP

cc: Miss Virginia Riggio

PLAINTIFF'S EXHIBIT NO. 15

LETTER FROM MRS. W. JOHNSON, DIRECTOR OF NURSING, SOUTHEASTERN GENERAL HOSPITAL to DR. McCARTER, PRESIDENT OF SOUTHEASTERN COMMUNITY COLLEGE, dated July 1, 1974.

Southeastern General Hospital

LUMBERTON, NORTH CAROLINA 28358

July 1, 1974

Dr. McCarter, President
Southeastern Community College
Whiteville, North Carolina

Re: Frances B. Davis

Dear Dr. McCarter:

Mrs. Davis and I have discussed her hearing problem and she is very aware of the areas where she could function

140a

adequately. On a busy, noisy unit it would be difficult but in areas such as long term care, a doctor's office or even industrial she could do well.

I do not believe that I can truthfully state that she would not be able to function in any area of nursing with her present determination to continue her education.

Sincerely,

Wilhelmina S. Johnson

(Mrs.) Wilhelmina S. Johnson
Director of Nursing Service

WSJ:y

141a

PLAINTIFF'S EXHIBIT NO. 16

LETTER FROM DEAN MOORE TO MRS. JOHNSON, dated July 8, 1974.

July 8, 1974

Mrs. Wilhelmina S. Johnson
Director of Nursing Service
Southeastern General Hospital, Inc.
P. O. Box 1408
Lumberton, North Carolina 28358

142a

Dear Mrs. Johnson:

Dr. Ronald McCarter asked that I reply to your July 1, 1974 letter to him concerning Mrs. Frances B. Davis. In order to properly reconsider Mrs. Davis' application to our Associate Degree Nursing Program, it would be helpful if you, as Director of Nursing Service at Southeastern General Hospital, would respond to the following question:

> If Mrs. Davis were a graduate of our Associate Degree Nursing Program and licensed as a Registered Nurse by the North Carolina Board of Nursing, would you employ her at Southeastern General Hospital? (It would be helpful to us if you can also elaborate on the conditions or circumstances under which she would or would not be employed.)

If you are not able to answer this question at this time we would appreciate a letter to that effect. Thank you for your continued assistance as we attempt to assist Mrs. Davis in her educational and occupational planning.

Sincerely yours,

143a

Dan W. Moore
Dean for Student Development

DWM/tg

CC Dr. W. R. McCarter

PLAINTIFF'S EXHIBIT NO. 17

LETTER FROM MRS. JOHNSON TO DEAN MOORE, dated July 10, 1974.

July 10, 1974

144a

Mr. Dan W. Moore
Dean for Student Development
Southeastern Community College
Whiteville, North Carolina

Re: Frances B. Davis

Dear Mr. Moore:

I stated in my letter of 7-1-74 that I would employ Mrs. Davis in our Skilled Nursing Facility as an R.N.

---

if I had a vacancy. At the present time I have only one position on this Unit and I do not expect the person in this position to change but we have the new Methodist Home that will be built in the near future that will have positions that I feel she can handle.

Mrs. Davis could also handle the night assignment on our Post Partum Unit without difficulty after she is registered.

145a

If this does not clarify the situation please let me know.

Sincerely,

Wilhelmina S. Johnson

(Mrs.) Wilhelmina S. Johnson
Director of Nursing Service

PLAINTIFF'S EXHIBIT NO. 18

LETTER OF DEAN MOORE TO MRS. FRANCES DAVIS, dated August 8, 1974.

SOUTHEASTERN
COMMUNITY
COLLEGE

WHITEVILLE, NORTH CAROLINA 28472

Student Development Center

Mrs. Frances B. Davis
409 Friendly Street
Fairmont, North Carolina 28340

146a

Dear Mrs. Davis:

At our last meeting we discussed the relationship of your admission to the Associate Degree Nursing Program at Southeastern Community College and your possible licensing by the North Carolina Board of Nursing as a Registered Nurse; your employability, if licensed as a Registered Nurse; and the willingness of our nursing faculty to accept the responsibility of your supervision during your clinical experiences as a student. Since that meeting, we have contacted the North Carolina Board of Nursing; Southeastern General Hospital in Lumberton, North Carolina (as a potential employer); and our nursing faculty. A summary of the content of these communications follows:

147a

1) The North Carolina Board of Nursing requires for eligibility for taking the State Board Test Pool Examination "that an applicant has no limitations, physically, emotionally, or mentally, to prevent the applicant from practicing nursing after licensure without restrictions of any kind on the license." After reviewing the audiologist's report and making reference to the fact that your hearing limitations could interfere with your safely caring for patients, the board reiterated an earlier comment by writing "...we do not believe on the basis of facts we have now, that Mrs. Davis would either be safe for herself, or for patients, or for faculty to pursue a nursing education program."

2) Letters from Southeastern General Hospital indicate that if you were a Registered Nurse, you would be considered for employment there in areas in which your hearing limitations would not be a factor. Communications from hospital personnel specified areas in which your services could and could not be utilized.

3) On the basis of the audiologist's report; the reservations noted earlier from the North Carolina Board of Nursing; and conferences with you, in which your hearing difficulty was noted and discussed; members of the Southeastern Community College Nursing faculty are

not willing to accept you as a student in the Associate Degree Nursing Program. A basic inconsistency which they noted is the fact that your hearing limitation would require restricted or limited clinical experiences as a student and the North Carolina Board of Nursing requires that no limitations be placed on the possible licensure of applicants.

Thank you for your interest in Southeastern Community College. As we stated earlier, we would be happy to help you identify and work toward occupations in the field of health in which your hearing limitation would not be so critical as criteria for success and safety.

148a

Sincerely yours,

Dan W. Moore

Dan W. Moore
Dean for Student Development

DWM/mg

PLAINTIFF'S EXHIBIT NO. 19

LETTER FROM E. L. WILLIAMSON, counsel for Defendant, TO PHILIP A. DIEHL, counsel for Plaintiff, CONCERNING THE ADMISSION OF MRS. DAVIS TO THE COLLEGE, dated June 27, 1975.

WILLIAMSON & WALTON
ATTORNEYS AND COUNSELLORS AT LAW
136 WASHINGTON STREET
WHITEVILLE, NORTH CAROLINA
28472

E. L. WILLIAMSON
ELTON H. WALTON, III

AREA CODE
TELEPHONE

June 27, 1975

149a

Mr. Philip A. Diehl
Moses & Diehl
Attorneys at Law
127 West Edinborough Avenue
Raeford, North Carolina 28376

Re: Mrs. Frances B. Davis

Dear Mr. Diehl:

Your letter of June 23, 1975, addressed to Mr. James A. Schmidt, Director of Admissions, Southeastern Community College, has been referred to us for reply.

As requested, a copy of the Admission Criteria for the Associate Degree Nursing Program is enclosed for your information. Particular reference is made to "medical record" under the paragraph dealing with selection process since this aspect of Mrs. Davis' application is significant.

Mrs. Davis has in her possession and I presume has shown you an extensive amount of correspondence concerning her hearing defect and the evaluation of this impairment as it may affect her ability to function as a nurse. The college has gone to extensive efforts to determine the suitability of Mrs. Davis to be enrolled in the nursing program and the assertion that Southeastern Community College has arbitrarily chosen to exclude Mrs. Davis from the Associate Degree Nursing Program is unjustified. The college was able to admit only 45 students in the ADN Program from approximately 130 applications in 1974 and has approximately 134 applications so far for the 1975 program. Since it appeared from Mrs. Davis' application and her college work that the impairment of her hearing was a major factor to be given serious consideration, the college chose to involve the North Carolina Board of Nursing and an audiologist in the Speech and Hearing Clinic, Duke Hospital, Durham, North Carolina, and Director of Nursing Service, Southeastern General Hospital, Lumberton, North Carolina. Again, these things were done to assure utmost fairness and objectivity in determining the suitability of Mrs. Davis for this special study. If you have not already done so, please request from Mrs. Davis letters which were sent her including:

Letter dated May 17, 1974, from Miss Mary McRee, R.N., Executive Director, North Carolina Board of Nursing, Raleigh, North Carolina.

Letter dated June 26, 1974, from Dan W. Moore, Dean for Student Development, Southeastern Community College, to Miss Mary McRee.

Letter dated July 14, 1974, from Miss Mary McRee to Mr. Dan W. Moore.

Letter dated April 23, 1974, from Virginia D. Riggio, Director Nursing Program, Southeastern Community College to Dr. Kunze, Speech & Hearing Clinic, Duke Hospital, Durham, North Carolina.

Letter dated April 25, 1974, from Burton B. King, Audiologist, Duke University Medical Center to Virginia D. Riggio.

Letter dated July 1, 1974, from Mrs. Wilhelmina S. Johnson, Director of Nursing Services, Southeastern General Hospital, Inc., to Dr. McCarter, President, Southeastern Community College.

Letter dated July 8, 1974, by Dan W. Moore, Dean for Student Development to Mrs. Wilhelmina S. Johnson.

Letter dated July 10, 1974, from Mrs. Wilhelmina S. Johnson to Mr. Dan W. Moore.

These letters are extremely important as they deal specifically with the hearing defect of Mrs. Davis and the inadvisability of her involvement in patient care as a student in nursing because of this impairment.

I would be happy to confer with you further regarding this matte if necessary, but wish to advise that the college will not under the circumstances of this case reconsider its decision in denying Mrs. Davis admission to the Associate Degree Nursing Program.

Very sincerely yours,

WILLIAMSON & WALTON

By: [signature]

ELW:cs
Enclosure
cc: Dr. W. Ronald McCarter

PLAINTIFF'S EXHIBIT NO. 20

RENEWAL OF LICENSE FOR 1976-77 AS LICENSED PRACTICAL NURSE BY THE N.C. STATE BOARD OF NURSING, ISSUED TO FRANCES DAVIS

1976-1977 LICENSE TO PRACTICE AS A LICENSED PRACTICAL NURSE IN THE STATE OF NORTH CAROLINA

CERTIFICATE NUMBER 09581

EXPIRATION DATE DEC. 31, 1977

FRANCES BURCHETTE DAVIS
409 FRIENDLY ST
FAIRMONT N C

Renewal
No.05404

[signature]
SIGNATURE

[signature]
EXECUTIVE DIRECTOR
NORTH CAROLINA BOARD OF NURSING

DEFENDANT'S EXHIBIT NO. 1

OVERALL ESTIMATE OF SUITABILITY OF MRS. FRANCES DAVIS FOR THE ASSOCIATE DEGREE NURSING PROGRAM MADE BY MRS. P. ASHLEY on 4/25/74 AS AN INTERVIEW FOR ADMISSION, ALONG WITH NOTES OF MRS. WATTS.

Overall estimate of suitability for ADN Program.
Low 1 2 3 4 5 6 7 High
Academic O.K. - adjustment (?)
Date Apr 25 '74

Name: Mrs. Frances Davis
Address: Fairmont

Name of interviewer: P. Ashley.

Personal appearance	Low	1	2	3	(4)	5	High
Poise		1	2	3	(4)	5	
Ability to communicate		(1)	2	3	4	5	hearing difficulty
Self assurance		1	2	3	4	5	

Personality
shy ___ withdrawn ___ → to neutral ✓ ___ outgoing ___

154a

Attitude
Negative ✓ → Neutral ✓ ___ Positive ___ denies anxiety ? hearing prob. or defensive — very difficult to interview

Concept of nursing and her expectations
O.K - L.P.N.

Requested repeat of almost all statements - though she was sitting fore to face - Said my voice was too low - Prot cont' after I allayed to be concerned

Review Scores on C.O.P.

Year 2000	Letter Groups
Below 35 - weak	* Below 42% - weak
Above 35 - strong Nat. %ile_____	* Above 42% - strong Nat. %ile_____

To be tested daily May —

Students in strength range/good probability of success in ADN Program. She will have problems — (Not currently pursuing Nurs. Career —)

Student's estimate of her own ability to take standardized tests

poor ___ average ___ strong ___ Voiced hope she would do well

Health problems personal and family
(allergies, medications, etc.)
Hearing - has 1 son graduating from college - Heart cont'l Surgery not completely successful - Iron anemia

Explore time will have for studies and clinical experiences.
Alternate career plans discussed. adequate - 3 sons - College next yr - does now arranging day cleaning estab - plans to

155a

Any indications that she will pursue.
determined - will have difficulty re Long Hours

Administer questionnaire * Emphasize merely to gather data for future use.

Please complete interview guide before you go to the next interview.

SOUTHEASTERN COMMUNITY COLLEGE

ADMISSIONS INTERVIEW FORM

Date of Interview 4-25-78

Name: Frances P. Davis

Address 409 Friendly St.
Fairmont, N.C.

Previous School (s) attended:

H.S. Philadelphus H.S.

Date of Graduation: '50

Other: P.S.U. / R.T.I 2 Years

Work Exp: LPN - S.E. Gen

Date of Birth 8-31-32

PROGRAM INTEREST: (Circle One) C.T. (TECH) V. Undecided

Specific Interest: ADN

156a

Date to Begin: Fall Full Time ✓ Part Time _____

Financial Aid Status: _____Will apply; _____Will not apply

Recommendations:

Developmental	Credit	Needs to Remain Full Time For:
Eng. 94 _____	Advanced Math (112-113)_____	_____Soc. Secruity
Eng. 97 _____	Science:	_____Veterans Aid
Mat. 98 _____	Bio._____	_____Financial Aid
Sci. 97 _____	Chem._____	_____Other:_____
ASP_____	Phys. Sci._____	_____
	Courses Exempted	
	Psy. of Learning_____	
	Phys. Ed. _____	

Interviewer: Watts

157a

DEFENDANT'S EXHIBIT NO. 2

CVERALL EVALUATION OF SUITABILITY FOR ADN PROGRAM BY ANNIE ODOM dated 3/18/74.

...bility for ADN Program.
... 1 2 3 4 5 6 7 High

Date 3/...

..., Frances

...

...of Interviewer: Odom

Personal appearance Low 1 2 (3) 4 5 High

Poise 1 2 (3) 4 5

Ability to communicate 1 (2) 3 4 5

Self assurance 1 2 (3) 4 5

Personality may be overconfident
shy ___ withdrawn ___ neutral ✓ outgoing ___

Attitude
Negative ___ Neutral ✓ Positive ___

158a

Concept of nursing and her expectations - LPN - worked at SEGH 1966 - (69-70) 3½ yrs - private duty. Desires to go to Fairmont - Hopes about 1½ years to RN upon completion of ADN program.

Review Scores on C.O.P.

Year 2000		Letter Groups	
Below 35 - weak		Below 42% - weak	
Above 35 - strong	Nat. %ile_____	Above 42% - strong	Nat. %ile_____

Students in strength range good probability of success in ADN Program.

Student's estimate of her own ability to take standardized tests

poor ___ average ✓ strong ___

Health problems personal and family. (allergies, medications, etc.) hearing difficulty - wears hearing aid. No allergies - no meds now - (*) see back

Explore time will have for studies and clinical experiences.

Alternate career plans discussed - shorthand at family dry Career business. Father ill - takes care of him -

159a

Any indications that she will pursue. No -

Administer questionnaire * Emphasize merely to gather data for future use.
Please complete interview guide before you go to the next interview.

160a

* Her hearing impairment is ... to repeat what I said several times during the interview I discussed this with her example: patients may need to repeat - as obviously I did - I do not recommend her for the ADN program -

Annie Odom -

* She was really vague about working as RN - even if she goes through program. She is not now working as LPN -

161a

DEFENDANT'S EXHIBIT NO. 3

COLLEGE GRIEVANCE PROCEDURE

GRIEVANCE PROCEDURE

The procedure outlined here is open to the student to seek justice if he feels that he is being or has been, in any way, treated unfairly in his association with Southeastern Community College, other than grievances which are covered under the Student Code of Conduct. The student shall initiate any grievance by mid-term of the quarter following that in which the grievance occurred.

A student who has a grievance should first discuss it with the person who is the source of the grievance. However, if the student feels that he cannot meet with this person, it is suggested that he discuss his grievance with a counselor. The counselor will help the student think through the grievance and, if the student desires, assist him in developing a written statement of the grievance to be presented to the student's dean and to the appropriate dean or superior of the staff member, if different from the student's dean. The dean or deans will study the problem, gather evidence, and render a decision. If the dean or deans are unable to reach a decision the grievance will be referred to the Grievance Committee.

Either the student or the staff member may appeal the dean's decision to a special grievance committee. The Grievance Committee shall consist of three students, two faculty members and two administrators. The students, two from the College Parallel Division and one from the Technical - Vocational Division, will be appointed by the Student Senate. The faculty members shall be elected by the faculty at large. The administrators shall be the Vice President, who will chair the committee with voting power, and the Dean for Student Development.

No member of the Grievance Committee shall participate in any occasion when he is directly involved as an initiator or a source of a grievance. The committee shall hear both sides of the grievance and render a decision by majority vote. The hearing will be closed to the public and taped. The tape(s) may be made available to the public upon a "need to know" basis.

If either party of the grievance wishes, he may appeal the decision of the Grievance Committee to the President.

Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SY DUBOW
MARC P. CHARMATZ
LARRY J. GOLDBERG
ANDREW S. PENN

THE NATIONAL ASSOCIATION OF THE DEAF LEGAL DEFENSE FUND

P.O. Box 1793
7th Street & Florida Ave., N.E.
Washington, D.C. 20002
(202) 547-0540

PHILIP A. DIEHL
WARREN L. PATE
127 W. Edinborough Avenue
Raeford, North Carolina 28376
(919) 875-3349

Counsel for Respondent

November 27, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Frances B. Davis, Respondent, respectfully prays that this court deny the Petitioner's Writ of Certiorari to review the judgment and opinion of the U.S. Court of Appeals for the Fourth Circuit entered in this proceeding on March 28, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 574 F.2d 1158, and is reprinted in Petitioner's Appendix A, p. 2a.

The opinion of the United States District Court for the Eastern District of North Carolina, in the form of findings of fact and conclusions of law, is reported at 424 F.Supp. 1341, and is reprinted in Petitioner's Appendix B, p. 12a.

JURISDICTION

Frances B. Davis, the respondent, brought this civil action under the Rehabilitation Act of 1973, 29 U.S.C. §794, and under the Civil Rights Act of 1871, 42 U.S.C. §1983, complaining that the petitioner college had unlawfully denied her admittance to its nursing program because of her admitted hearing disability. On December 22, 1976,

the District Court entered a final judgment dismissing tha action for lack of constitutional and statutory merit. See Appendix B, p. 12a,

On the respondent's appeal, the Fourth Circuit on March 28, 1978, affirmed the District Court's judgment in part, vacated the judgment in part, and remanded the case to the District Court for further proceedings. See Appendix A, p. 2a. On June 29, 1978, the Fourth Circuit denied both a petition for rehearing and suggestion for rehearing en banc, although there were dissents from both denials. See Appendix A, p. 1a.

On September 18, 1978, Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including October 27, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that no "otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from participation in...any program or activity receiving Federal financial assistance." The questions here presented are:

1. Whether Section 504 of this Act precluded a public college from basing a denial of admission to the college's Associate Degree Nursing Program solely upon an admittedly severe hearing handicap of the applicant, where it was shown that the handicap could interfere with the applicant's ability to provide safe patient care both as a student nurse and as a potential Registered Nurse.

2. Whether Section 504 of this Act impliedly imposes upon colleges and univer-

sities an affirmative obligation to provide opportunities for the seriously handicapped who seek admission to highly skilled professional programs.

3. Whether Section 504 of this Act impliedly gives rise to a private right of action in a federal court by a handicapped individual who has been denied admission to a college's nursing program because of the physical handicap.

4. Whether, if such a private action is implied, the handicapped applicant must first pursue and exhaust available H.E.W. administrative remedies respecting individual complaints of discrimination.

STATUTES AND RULES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794:

No otherwise qualified handicapped individual in the United States, as defined in

section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§84.3 Definitions.

As used in this part, the term:

* * * * * * * * * * * * * * * * * * *

(k) "Qualified handicapped person" means

* * * * * * * * * * * * * * * * * *

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

Definitions - 5. "Qualified handicapped person." Paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all of the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects

the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

STATEMENT OF THE CASE

Frances Davis is an actively employed, duly qualified, licensed practical nurse. Her license, issued by the State of North Carolina in 1967, is currently in good standing. (Pl. Ex. 2)

Seeking to advance in the nursing profession, Ms. Davis in 1973 applied to Southeastern Community College for admission as a student in the 1973-74 school term, preparatory to entering the college's Associate Degree Nursing Program in September 1974. (Pl. Ex. 4) Ms. Davis submitted, as part of her application, her Pre-entrance Medical Record, which evaluated her as "...mentally and physically able to undertake the program in nursing." (Pl. Ex. 5) She then success-

fully completed her scheduled classes during the 1973-74 term.

As part of the college's evaluation process, Ms. Davis was interviewed in April of 1973 and again in March 1974. The college then requested that Ms. Davis submit an evaluation of her hearing by an audiologist.

The hearing evaluation indicated that Ms. Davis has a bilateral moderately severe sensori-neural hearing loss. The audiologist determined that the hearing aid worn by Ms. Davis "provided little if any help... and should be replaced." The audiologist concluded that: "Although Mrs. Davis performs adequately with the new hearing aid, she was encouraged to use her vision to support her hearing. She relies on her vision in helping her understand the speech of those with whom she is associated. The hearing aid imporves her hearing level to the"outer

limits of normal hearing levels." (Pl. Ex. 6)

The audiologist further reported that Ms. Davis had been fitted with a new hearing aid, "which provides her significant improvement in her hearing." (Pl. Ex. 8) Nevertheless, the college scheduled no further interviews with Ms. Davis. Instead, the college advised Ms. Davis that she did not qualify for acceptance in the college nursing program. (Pl. Ex. 9)

Ms. Davis then asked the college to review her application. The college requested an opinion from the Executive Director of the North Carolina Board of Nursing, who responded: "We concur with your opinion as stated on the telephone, that Ms. Davis' hearing disability can preclude her being safe for practice in any setting allowed by a license as a RN, or by license

as a LPN."[1] (Emphasis Added) (Pl. Ex. 11) But, the Executive Director further stated: "We cannot, at this time, predict eligibility or ineligibility for the licensing examination should Mrs. Davis enroll in, and be allowed to complete the program some several years hence." (Pl. Ex. 14)

The college also asked the Director of Nursing Services at Southeastern General Hospital whether the hospital would employ her as a registered nurse. (Pl. Ex. 16) The Director of Nursing Services responded, "In areas such as long term care, a doctor's office or even industrial, she could do well. I do not believe that I can truthfully state that she would not be able to function in any area

---

[1]The Director obviously did not have the full facts on Ms. Davis' employment background. Petitioner misleads this Court in omitting this key underlined phrase.

of nursing with her present determination to continue her education." The Director further stated:

> I would employ Mrs. Davis in our Skilled Nursing Facility as an R.N. if I had a vacancy... we have the New Methodist Home that will be built in the near future that will have positions that I feel she can handle. Mrs. Davis could also handle the night assignment on our Post Partum Units without difficulty after she is registered.

(Pl. Ex. 15 & 17)

Citing the reports of the audioligist, the Executive Director to the State Board of Nursing, and the Director of Nursing Services at Southeastern General Hospital, the college then again rejected her application. Thereafter, she brought this suit.

Testimony at trial revealed that Ms. Davis was academically qualified for admission into the nursing program and that her application was rejected solely because of

her hearing disability. (Joint App. 47, 114) Yet, the testimony also indicated that there are no physical distinctions in qualifications for a Registered Nurse and a Licensed Practical Nurse under North Carolina Statute (Joint App. p. 70) The testimony further revealed that Ms. Davis, with an instructor supervising her, could have accomplished all skill levels in the clinical program, but that the college did not want to modify its program to compensate for Ms. Davis' hearing difficulty. (Joint App. p. 78) The college also admitted that it was not prepared to provide Ms. Davis with the supervision that might be necessary to compensate for her hearing disability in the clinical program. (Joint App. p. 79) Despite these admissions, the college still maintained that Ms. Davis "was not qualified or suitable for the Associate Degree Nursing Program by reason of her

disability." (Petition p. 17a)

The District Court held that Ms. Davis was not "otherwise qualified," and concluded that the college had not violated either Section 504 or 42 U.S.C.§1983 in refusing to admit Ms. Davis to the college's nursing program. (Petition, p. 20a)

On Appeal, the Fourth Circuit held unanimously that the District Court had erred in its reading of Section 504, particularily in light of the H.E.W. Regulation to Section 504, issued after the District Court decision. The Fourth Circuit ordered the District Court to reconsider Ms. Davis' application for admission to the college nursing program without regard to her hearing disability.

The court noted that "the college may consider such other relevant subjective and objective factors... utilized in the consideration of other candidates for enrollment in

the nursing program." (Petition p. 5a) While college nursing personnel had admitted that Ms. Davis was academically qualified, the panel expressed no further opinion concerning Ms. Davis' scholastic suitability. (Petition p. 5a)

The panel, thus, concluded that the District Court erred by considering the nature of Ms. Davis' hearing disability in determining whether she was otherwise qualified for admittance to the nursing program, instead of focusing upon her academic and technical qualifications as required by the H.E.W. Regulation. (Petition p. 6a) In light of the position of the college that it was not prepared to modify its nursing program to accommodate Ms. Davis' hearing disability, the panel directed the District Court, on remand, to give close attention to the H.E.W. Regulation requiring the college to modify

its program so as to accommodate Ms. Davis' disability. (Petition p. 9a)

The Fourth Circuit also affirmed the implicit ruling of the District Court that a private right of action exists under Section 504. (Petition p. 3a) However, in a footnote, the panel suggested that the District Court also consider the issue of administrative exhaustion and primary jurisdiction, matters which had not been raised in either the District Court or in argument before the panel. (Petition p. 11a)

The college petition for rehearing was soundly rejected, with only two judges voting to affirm the judgment of the District Court.

REASONS FOR DENYING THE WRIT

I. THE HOLDING IN THIS CASE IS TOO NARROW TO WARRANT REVIEW.

In asking the Supreme Court to grant a writ of certiorari in this case, petitioner seriously overstates both the breadth and potential impact of the Court of Appeals decision. Contrary to Petitioner's assertion, the holding in this case is too narrow to warrant review by this Court. From the outset of its opinion, the Fourth Circuit consistently stressed that, "Our holding on the merits of plaintiff's Section 504 claim is rather narrow." (Petition p. 5a)

Indeed, the only mandated result of the Fourth Circuit's decision is the remanding to the District Court for reconsideration of Ms. Davis' application for admission, in light of regulations implementing Section 504 that postdate the District Court decision. This remand is totally consistent

with the action of other circuits. See United Handicapped Federation v. Andre, 448 F. 2d 413 (8th Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1287-8 (7th Cir. 1977). This Court has followed a similar procedure of remanding to reconsider new regulations adopted after a decision in the lower courts. See Youakim v. Miller, 425 U.S. 231 (1975); Richardson v. Wright, 405 U.S. 208 (1972); Thorpe v. Housing Authority, 386 U.S. 670 (1967).

Yet Petitioner ignores the Fourth Circuit's express limitation of its decision "to the facts of this particular case." (Petition, p. 8a n.7a) Instead, Petitioner contends that the Fourth Circuit decision involves a significant initial interpretation of Section 504. To the contrary, the Court of Appeals made clear the limited scope of

their opinion when they stated, "We do not, at this time, absent a more fully developed record below, wish to expand further upon the regulations, their reasonableness, or their scope." (Petition 8a,n.7a)

II. THE FOURTH CIRCUIT WAS CORRECT IN VACATING AND REMANDING, IN LIGHT, OF INTERVENING REGULATIONS THE DISTRICT COURT'S DECISION ON THE MEANING OF "OTHERWISE QUALIFIED."

The Fourth Circuit found that the District Court's definition of "otherwise qualified" was contrary to the definition in subsequent HEW Regulations. In erroneously defining "otherwise qualified," the District Court held that the college could consider the nature of Ms. Davis' handicap in determining if she was "otherwise qualified" for admittance to the nursing program. The intervening HEW regulations, however, focus upon her academic and technical qualifications

in determining if she is qualified for admittance. The Fourth Circuit thus merely applied the law in effect at the time of its decision, Thorpe v. Housing Authority, 393 U.S. 268 (1969), giving great weight to the interpretation of Section 504 by the agency charged with its administration. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Udall v. Tallman, 380 U.S. 1 (1965).

In continually raising the spectre of the "blind bus driver," Petitioner seriously distorts the facts of this case.[2] While the Fourth Circuit left to

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[2]Petitioner further misleads this Court by indicating that the blind bus driver example is part of the definition which relates to post-secondary education of "qualified handicapped persons" (84.3(k)(3)). Rather, this example is included in the HEW analysis of the more general definition of "qualified handicapped person" that should logically be limited to employment.

the District Court the determination of affirmative relief, it should be noted that Ms. Davis' handicap is not as severe as Petitioner suggests. The college admits that she is academically qualified to participate in the Nursing Program. (Joint App. 14) The audiologist concluded that Ms. Davis can read lips well and that a new hearing aid "improves her hearing level to the outer limits of normal hearing levels." (Petition, p. 6a,n.6). For the last eleven years, Ms. Davis has been a duly qualified licensed practical nurse. Moreover, both the Fourth Circuit and the Director of Nursing Services at Southeastern General Hospital concluded that there are a number of settings in which Ms. Davis could perform satisfactorily as a registered nurse, such as industry or a physician's office. (Petition, p. 6a,n.6)

III. THE CIRCUIT COURT WAS CORRECT IN SUGGESTING THAT THE DISTRICT COURT GIVE CLOSE ATTENTION TO AFFIRMATIVE RELIEF PROVIDED IN INTERVENING HEW REGULATIONS.

Many of the issues that Petitioner raises, including affirmative relief and its financial repercussions, were never raised before the District Court or the Fourth Circuit panel. It was, therefore, entirely proper and fair for the Appeals Court to remand to the District Court for the taking of evidence and consideration of these issues. The Court of Appeals merely identified the issue of affirmative relief and instructed the District Court to give "close attention, on remand," to it. (Petition p. 9a) The Court of Appeals stated, "Of course, as we note in this opinion, repeatedly, the application and interpretation of the H.E.W. Regulations lie, in the first instance,

with the district court." (Petition, p. 8a,n.8)

This Court has consistently refused to consider issues which had not been pleaded, proved, or briefed either in Federal District Court or in the Court of Appeals. See Miree v. Dekalb County, Ga., 433 U.S. 25 (1977); Stone v. Powell, 428 U.S. 465 (1976), rehearing denied. 429 U.S. 874 (1976); U.S. v. Estate of Donnelly, 397 U.S. 286 (1970). The Court should therefore not consider these issues at this time.

IV. A PRIVATE RIGHT OF ACTION EXISTS UNDER SECTION 504 AND THE ISSUES OF FEDERAL ADMINISTRATIVE EXHAUSTION AND PRIMARY JURISDICTION ARE NOT PROPERLY BEFORE THIS COURT.

Petitioner's argument on the private right of action issue has been mooted by the passage of the Rehabilitation, Comprehensive Services, and Devlepmental

Disabilities Amendments of 1978, P.L. 95-602, which were signed by the President on November 6, 1973.[3] The express statutory language of Section 505(b) of the 1978 Amendments recognizes the right to maintain a private action under Section 504: "In any action or proceeding to enforce or charge a violation of a provision of this Title, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Senate Committee Report on the 1978 Amendments explains the need for attorneys' fees as follows:

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[3]This Court has long adhered to the principle that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. Red Lion, 395 U.S. 367 (1969); FHA v. Darlington, 358 U.S. 84 (1958); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Regents of Univ. of Calif. v. Bakke, 98 S.Ct. 2733 (1978).

> The committee believes that the rights extended to handicapped individuals under Title V...are, and will remain, in need of vigilance by handicapped individuals to assure compliance, and in vindicating private rights of action in the case of Section 502 and Section 503 cases, as well as those arising under Section 501 and 504. S.REP. NO. 95-890, 95th Cong. 2d Sess. 19 (1978) (Emphasis added). See also, 124 CONG. REC. S15590-S15593 (daily ed. Sept. 20, 1978) (remarks of Sens. Cranston and Bayh).

In Section 505(a), the 1978 Amendments again recognize the existence of a private right of action. Section 505(a)(1) provides that the rights, remedies, and procedures available under Section 504 shall be co-extensive with those available under Title VI of the Civil Rights Act of 1965, 42 U.S.C. 2000(d).[4] Legislative

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[4]The rights and remedies available under Title VI include a private right of action. Bakke, 98 S.Ct. at 2814-2815; Lau v. Nichols, 414 U.S. 563 (1974); Bossier Parrish School Bd. v. Lemon, 370 F.2d 847

history of Section 505(a)(1) explicitly recognizes that those rights include the right to maintain a private cause of action. See 124 CONG. REC. S1593 (daily ed. Sept. 20, 1978) (remarks of Sens. Cranston and Bayh).

Moreover, in the opinion concurred in by Chief Justice Burger and Justices Rehnquist and Stewart, Justice Stevens in Bakke, specifically cited Section 504 as an example of legislation which "Congress has repeatedly enacted...predicated on the assumption that Title VI may be enforced in a private action." 98 S.Ct. at 2814-2815.

Every circuit court which has considered the question of a private cause

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(5th Cir. 1967), cert. denied, 338 U.S. 911 (1967); Serna v. Portales, 499 F.2d 1147 (10th Cir. 1974)

of action under Section 504 has also sustained its existence.[5] In addition, numerous federal district courts have found that a private right of action exists under Section 504.[6] A private right of action is also supported by the United States Departments of Justice, and Health,

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[5]See Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); Lloyd v. Regional Transp. Auth.; United Handicapped Federation v. Andre; Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Davis v. Southeastern Community College, 574 F.2d 1158 (1978).

[6]See Whitaker v. N.Y. Bd. of Ed., 77-C-2258 (E.D.N.Y. October 19, 1978); Davis v. Bucher, 46 U.S.L.W. 2699 (E.D. Pa. May 13, 1978); Camenisch v. Univ. of Tx., No. A-78-CA-061 (W.D. Tx. May 17, 1978); Simon v. St. Louis County, C.A. 77-114-C(4) (E.D. Mo. Jan. 31, 1978); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976); Mattie T. v. Holladay, C.A. No. D.C. 75-31 (S.D. Miss. July 28, 1977); Borden v. Rohr, No. 75-0844 (S.D. Ohio Dec. 31, 1975); Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wisc. 1975); Crawford v. Univ. of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); Herbold v. The Trustees of the Calif. St. Univ. and Colleges, C-78-1358-RHS (N.D. Cal. July 17, 1978).

Education and Welfare.[7]

Petitioner contends that if a private right of action is found, the Court must consider the issues of exhaustion of federal administrative remedies and primary jurisdiction. However, neither the District Court nor the Appeals Court considered whether federal administrative remedies were exhausted. Indeed, neither court ever determined whether administrative remedies even exist. The Fourth Circuit properly remanded to the District

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[7]The views of HEW, as the agency charged with administering Section 504, are entitled to great weight. Martinez v. Mathews, 544 F.2d 1233 (5th Cir. 1976). See also Allen v. State Bd. of Elections 393 U.S. 544, 557 n.23 (1969), in which this Court deemed it, "significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits."

Court to consider, if it deemed advisable, the legal issues of exhaustion and primary jurisdiction not reached in the Fourth Circuit opinion. (Petitioner, 11a n.9) Clearly these issues, like the issue of affirmative relief discussed above, are new matters which cannot be raised in this Court. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); U.S. v. Estate of Donnelly 397 U.S. 286 (1970); Adickes v. Kress & Co., 398 U.S. 144 (1970); Tennessee v. Dunlap, 426 U.S. 312 (1976).

CONCLUSION

In sum, Petitioner has tried to distort the limited holding of the Fourth Circuit. The Fourth Circuit held only that, in light of intervening regulations, the college could not deny Ms. Davis

admission solely on the basis of her handicap. The Fourth Circuit also suggested that the District Court give close attention on remand to the affirmative relief set out in the HEW Regulations. The Fourth Circuit left it to the District Court to apply and interpret these regulations and allow the parties to develop a record on issues not raised in the District Court. The Fourth Circuit holding was exceedingly narrow and fair. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

Sy DuBow

Marc P. Charmatz

Marc P. Charmatz
Larry J. Goldberg
Andrew S. Penn
National Association of

the Deaf Legal Defense Fund
7th St. & Florida Ave., N.E.
P.O. Box 1793
Washington, D.C. 20002
(202) 447-0445

Philip A. Diehl
Warren L. Pate
Moses Diehl & Pate
127 W. Edinborough Ave.
Raeford, N.C. 28376

Counsel for Respondent

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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 933-5106

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.D. 28472
(919) 642-7151

Counsel for Petitioner

February 23, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

Southeastern Community College, the petitioner herein, prays that this Court, upon a full review of the arguments and the record, reverse the judgment of the United States Court of Appeals for the Fourth Circuit, with directions that the judgment of the United States District Court for the Eastern District of North Carolina, in favor of the petitioner, be reinstated.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 574 F.2d 1158, and is reprinted in Appendix A of the petition for certiorari, p. 2a.

The opinion of the United States District Court for the Eastern District of North Carolina, in the form of findings of fact and conclusions of law, is reported at 424 F.Supp. 1341, and is reprinted in Appendix B of the petition for certiorari, p. 12a.

JURISDICTION

Frances B. Davis, the respondent, brought this civil action under the Rehabilitation Act of 1973, 29 U.S.C. § 794, and under the Civil Rights Act of 1871, 42 U.S.C. § 1983, complaining that the petitioner College had unlawfully denied her admittance to its nursing program because of her admitted hearing disability. On December 22, 1976, the District Court entered a final judgment dismissing the action for lack of constitutional and statutory merit. See Appendix B of the petition for certiorari, p. 12a; 424 F. Supp. 1341.

On the respondent's appeal, the Fourth Circuit on March 28, 1978, affirmed the District Court's judgment in part, vacated the judgment in part, and remanded the case to the District Court for further proceedings. See Appendix A of the petition for certiorari, p. 2a; 574 F.2d 1158. On June 29, 1978, the Fourth Circuit denied both a petition for rehearing and a suggestion for rehearing en banc, although there were dissents from both denials. See Appendix A of the petition for certiorari, p. 1a, 574 F.2d at 1163. Following an extension of time, the petition for

certiorari was timely filed on October 27, 1978. This Court granted the petition on January 8, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides that no "otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in . . . any program or activity receiving Federal financial assistance." The questions here presented are:

1. Whether Section 504 of this Act precludes a public college from basing a denial of admission to the college's Associate Degree Nursing Program solely upon an admittedly severe hearing handicap of the applicant, where it was shown that the handicap could interfere with the applicant's ability to provide safe patient care both as a student nurse and as a potential Registered Nurse.

2. Whether Section 504 of this Act impliedly imposes upon colleges and universities an affirmative obligation to provide affirmative and expensive accommodation for the seriously handicapped who seek admission to programs designed to train and educate them for professional employment involving a high degree of physical and mental dexterity.

3. Whether Section 504 of this Act impliedly gives rise to a private right of action in a federal court by a handicapped individual who has been denied admission to a college's nursing program because of the physical handicap.

4. Whether, if such private right of action is implied,

the handicapped applicant must first pursue and exhaust available H.E.W. administrative remedies respecting individual complaints of discrimination.

STATUTES AND RULES INVOLVED

Section 7 of the Rehabilitation Act of 1973, 29 U.S.C. § 706, as amended:

(6) The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the*

Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

[Emphasis added indicates amendment to Section 504 by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982 (1978) ("the 1978 Amendments").

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§ 84.3 *Definitions.*

As used in this part, the term:

* *

(k) "Qualified handicapped person"means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

* *

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

Definitions – 5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped

person." Throughout the regulation this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 377:

Section 84.3(k)(3) . . . defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 795, added by the 1978 Amendments:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000c-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section

501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

(b) In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Respondent Davis brought this civil action in the District Court for the Eastern District of North Carolina against the petitioner Southeastern Community College, a public educational institution located at Whiteville, N.C. The District Court found that it had subject matter jurisdiction under 28 U.S.C. § 1343(3) to consider two federal statutory claims asserted by Davis:

(A) A claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, alleging that the College had unlawfully discriminated against Davis by denying her

admission to its Associate Degree Nursing Program by reason of an obvious and admitted hearing disability; and

(B) A claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that the College, by denying her admission on that basis, had also denied Davis the right to due process and equal protection of the laws. This § 1983 claim, however, is not presently in issue, the Fourth Circuit having rested its decision solely on considerations stemming from Section 504 of the Rehabilitation Act. See footnote 4 of the opinion below.

The relevant factual predicates of the Section 504 issues are found in the twelve Findings of Fact rendered by the District Court after a full evidentiary hearing. See Appendix B of the petition for certiorari, pp. 13a-17a; 424 F. Supp. at 1342-1344. For the most part, those findings are uncontested, and reflect the following facts of record:

(1) The central fact in this case is that Davis, according to an independent audiologist associated with Duke University Medical Center, has long had "a severe impairment of her ability to hear, which was detected early in the admission process," and "has a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear . . . [and] a speech discrimination loss which results in remarkable difficulty in understanding speech because of the distortion in her hearing." Finding 7.[1] However, by using a

[1] According to the audiologist's report (App. 124a-125a), Davis reported that she had had this hearing loss for many years, that her father and two sisters have significant hearing losses, and that she had worked in a dry cleaning plant for three years. She was born in 1932. App. 116a.

It is unquestioned that Davis is a "handicapped person" within the statutory sense. 29 U.S.C. §706(6) includes a serious hearing defect as a physical impairment "which substantially limits one or more of such person's major life activities."

hearing aid and reading lips, "she is skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others." Finding 7. While Davis was found to be aware of gross sounds in the listening environment and to reach the outer limits of normal hearing levels with the use of hearing aids, the audiologist concluded that Davis "can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker." App. 128a.

(2) In 1967, Davis was duly qualified by the North Carolina authorities as a Licensed Practical Nurse. While there was no evidence that she was continuously employed in that position, the license is currently in good standing. But the testimony at trial indicated that a Licensed Practical Nurse, unlike a Licensed Registered Nurse, "operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." Finding 5.

(3) Davis was enrolled at the petitioner College during the 1973-74 academic year in the undergraduate College Parallel program, designed as preparatory for entrance into the College's Associate Degree Nursing Program. The latter program was structured to train persons to become eligible for testing and licensing, by North Carolina authorities, as Registered Nurses. Findings 2, 4.

(4) Davis successfully completed her courses in the College Parallel program, and thereupon sought admission to the Associate Degree Nursing Program. The College had established criteria for admission to that program, including not only scholastic criteria but an evaluation of the

physical condition of the applicant.[2] At the time of Davis' application in 1974, there were in excess of 100 applicants for admission and only 45 available positions to be filled for the quarter in which Davis applied. Finding 6.

(5) In implementing the College's admission criteria, Davis was interviewed by professional members of the College's nursing program staff to determine her suitability for admission to the program. Because of her obvious hearing impairment, Davis was referred to an independent audiologist at Duke University Medical Center for an evaluation of her hearing disability. The findings and conclusions of the audiologist have been summarized in Paragraph (1) above; see also App. 124a-125a, 127a-128a, and Finding 7.

(6) In the course of its review of Davis' suitability for the nursing program, the College submitted the audiologist's reports to the Executive Director of the North Carolina Board of Nursing and requested her advice as to Davis' acceptability as a potential Registered Nurse. The Executive Director responded (App. 132a-134a) that

> ". . . Mrs. Davis's hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, . . . we would question the advisability of you and the faculty's assuming responsibility for Mrs. Davis's involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with Mrs. Davis's hearing limitations could

[2] The College's admission criteria, made available to all prospective applicants for the Associate Degree Nursing Program, required that the following item be included in each student's application folder: "Medical record – serious consideration given to existing health problems." App. 112a. See also Finding 12.

> in fact, be the same as denying her full learning to meet the objectives of your nursing programs.
>
> "The basis for our opinions is found in the audiologist's response to you from Duke University on April 25, and the relationship of this response to expectations of nurses in patient care. . . . Both you and I can identify innumerable patient care situations in which this lady's abilities as defined in the [audiologist's response] would be inadequate for her probably to identify all of the patient's needs for which she would be accountable or even to pick up some clues to situations that could be quite critical to the point of life, death, situations.
>
> ". . . We would urge the college in counselling Mrs. Davis to alter her career goal, as we do not believe, on the basis of facts we have now, that Mrs. Davis would either be safe for herself, or for patients, or for faculty to pursue a nursing education program."

The Executive Director supplemented these opinions in responding further to the College's inquiry whether Davis' hearing difficulties would prevent her from being licensed as a Registered Nurse by the state Board of Nursing (App. 138a-139a). While the Executive Director could not presently predict eligibility several years hence for taking the licensing examination, she did state that

> ". . . one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse . . . includes evidence that an applicant has no limitations, physi-

> cally, emotionally, or mentally, to prevent the applicant from practicing nursing, after licensure, without restriction of any kind on the license. From the facts presented . . . and the audiologist's report of Mrs. Davis's hearing capacity it is our opinion that Mrs. Davis has hearing limitations which could interfere with her safely caring for patients. This very situation, also in our opinion, could be highly frustrating to Mrs. Davis. . . .
>
> "We reiterate that each applicant for the licensing examination must provide evidence that he/she is able, if licensed, to practice nursing as legally defined without any restriction."

(7) In addition to noting these opinions of the Executive Director, the District Court further found that the testimony at the hearing showed "that in many situations such as an operation room, intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible" and that "in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." Finding 8.

(8) The District Court found that the College had denied Davis' application for admission upon the basis of these medical tests respecting her hearing defect. The College admissions authorities, in other words, concluded that Davis had a physical "inability and incapacity to serve in the Associate Degree Nursing Program" and felt that "she would be unable to serve as a Registered Nurse on completion of such program." Finding 9.

(9) Following the denial of Davis' application for admission in May of 1974, Davis visited the Office of the President of the College in June and asked that her application be reviewed again and reconsidered. This reconsideration request was granted, and a committee of staff nurses at the College reviewed all the available material, tests and records. This committee again voted to deny Davis' application. Davis made no further attempts to gain review through college procedures, although the record indicates that the College had a procedure for resolving intramural grievances that Davis could have invoked. See App. 162a. But the District Court found that in these circumstances "all parties concerned knew that the institution of any such [grievance] procedures would be, in essence, futile." Finding 10.

(10) At the evidentiary trial, Davis offered no testimony. She rested her case on the various letters, tests and other exhibits, referred to in the foregoing paragraphs, that had been offered into evidence by stipulation. The College, on the other hand, offered the testimony of various members of its nursing admissions staff, as well as the President of the College, all of whom testified to the effect that Davis "was not qualified or suitable for the Associate Degree Nursing Program by reason of her hearing disability." Finding 11. But Davis did elicit an admission, on cross-examination of the College's witnesses, that with special training and individual supervision she could perform adequately in some selected fields of training. See Appendix B of the petition for certiorari, p. 20a; 424 F.Supp. at 1346.

But such testimony also indicated that the additional supervision necessary in this case would have to be on a one-on-one basis, which would be impracticable and financially disastrous. See App. 35a, 46a, 51a-54a, 77a, 96a. More-

over, the witnesses repeatedly stressed that the College could certify a graduate of the nursing program only if she were safe and could function fully in all areas. See App. 35a, 51a-54a, 74a.

After noting that "the single major factor" in the denial was "her projected inability to be licensed as a Registered Nurse after graduation," the District Court concluded that such a denial was neither arbitrary nor capricious. And the District Court further concluded, on the implicit assumption that a private right of action lies under Section 504, that the College had not violated the Act. Section 504 was construed to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity.

On appeal, the Fourth Circuit panel held unanimously that the District Court had erred in its reading of Section 504, particularly in light of certain H.E.W. regulations that post-dated the District Court determination. Davis' hearing handicap, said the panel, could not be considered by the College in determining whether she was "otherwise qualified" – within the meaning of Section 504 – for admittance to the nursing program. Hence the panel vacated and remanded the Section 504 portion of the District Court judgment so that the latter court could focus upon Davis' academic and technical qualifications for admission. And on that remand, the District Court was directed to give "close attention" to Davis' request for some form of "affirmative relief" by way of modifying the nursing program so as to accommodate Davis and her hearing disability. See Appendix A of the petition for certiorari, pp. 8a-10a; 574 F.2d at 1162.

The Fourth Circuit panel also affirmed the implicit ruling of the District Court that a private right of action is available under Section 504. But the panel suggested that on the remand the District Court might want to consider the doctrines of administrative exhaustion and primary jurisdiction, matters which had been raised on rehearing but not resolved by the Fourth Circuit.

Chief Judge Haynsworth, one of the members of the panel that heard the appeal, dissented from the denial of the College's petition for rehearing. And Judges Russell and Widener dissented from the denial of rehearing en banc, stating that "they would affirm the judgment of the district court." See Appendix A of the petition for certiorari, p. 1a; 574 F.2d at 1163.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973 provides that no "otherwise qualified handicapped individual" shall be excluded from participation in any federally funded program or activity "solely by reason of his handicap." The central issue in this case revolves about the meaning and effect of the statutory phrase "otherwise qualified handicapped individual." That issue permeates all the questions presented.

The factual context of this case vitally affects the resolution of the statutory interpretation question, as well as all related questions. After a full hearing, the District Court below made extensive findings and conclusions respecting the nature of the respondent's hearing handicap and the physical ability of the respondent to participate safely and satisfactorily in the clinical aspects of the petitioner's Registered Nurse training program. Essentially,

the District Court found that respondent's hearing loss was so severe that she could not perform safely either in the RN training program or in her proposed RN profession. Of "particular concern" to the District Court was "the potential danger to future patients" in clinical situations where the hearing loss would affect the respondent's ability to sense and react to needs of the patients. By reason of those determinations, which were not contradicted by the Fourth Circuit, the District Court concluded that the respondent could not be considered "otherwise qualified" for participation in the petitioner's Associate Degree Nursing Program.

I

The first step in judicially interpreting a statute is to read the plain words used by Congress and to ascribe to those words their common meaning. The District Court below took that step and concluded that "otherwise qualified" can only be read to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F.Supp. at 1345. Principles of English grammar and the accepted dictionary definitions of "otherwise" and "qualified" fully support the District Court's reading of these words. In other words, an "otherwise qualified" handicapped individual is one who, despite his handicap, is fully qualified in all respects – including all physical qualifications that may reasonably and necessarily be requisite to participation in the activity in question.

What Congress said in Section 504 was that a handicap was not to be treated as a disqualification *per se*. What Congress did not thereby say was that a handicapped person should be relieved of the need for meeting all physical

and other standards by which all applicants for a program are assessed. Such legislative use of the "otherwise qualified" language is simply a technique for insuring that the beneficiary of a nondiscrimination duty must still satisfy all valid and reasonable qualifications imposed on all participants or applicants for participation in a program. See *United States v. Mississippi*, 380 U.S. 128, 138 (1965).

In this case, the Fourth Circuit abdicated its function of reading the plain words of Section 504. It relied instead on a selective and erroneous reading of certain H.E.W. regulations, which seemed to the Fourth Circuit to say that a handicapped person must be considered qualified if he is qualified in other respects that are in no way related to the handicap, i.e., academically. But the H.E.W. regulations, fairly read, do not support that interpretation of Section 504. On the contrary, the H.E.W. recognizes that Congress did not intend this language to refer to "persons who are qualified except for their handicap, rather than in spite of their handicap." See 45 C.F.R. Part 84, Appendix A, p. 376.

In sum, Congress intended in Section 504 that physical qualifications be maintained and applied to applicants for admission to postsecondary education programs, particularly where those programs involve clinical training and where safe participation requires full physical skills and dexterity. Any other interpretation necessitates the absurd assumption that Congress meant to waive all physical program qualifications for all those who are physically handicapped and to mandate their participation in programs and activities for which they may be quite unqualified in the physical sense – so unqualified, indeed, as to constitute a danger to themselves and to those around them.

Congress has made it abundantly clear in other sections of Title V of the Rehabilitation Act dealing with employment discrimination against the handicapped that the handicapped person – before he can claim any kind of discrimination – must be able to perform the essential functions of the job despite his handicap. In other words, he must still satisfy all job related physical and mental qualifications, at least if they are consistent with business necessity and the safe performance of the job.

It is fair to assume, therefore, that a clinical program solely designed to train those who are physically equipped to meet the demands of a particular job or profession must itself impose the identical physical and other qualifications used to determine entry into that job or profession. In this case, the petitioner's RN training program must apply the same rigorous qualifications as are necessary for service as a licensed professional RN. Indeed, the state licensing authorities depend upon the administrators of the RN training programs to weed out those who are physically and otherwise unqualified to treat the ill and the injured safely and competently.

The record in this case abounds with proof that a severe hearing loss, which compels respondent to rely a good deal on lip reading despite the use of a hearing aid, would pose numerous hazards to nursing patients, as well as to the nurse herself. And those hazards would be as present in a clinical training program as in licensed nursing situations. The District Court's findings in this respect are abundantly supported by the record and have not been challenged or disputed by the Fourth Circuit.

The conclusion thus becomes inescapable. The respondent Davis, with her severe hearing handicap, was simply not "otherwise qualified" within the meaning of Section 504.

She was not "qualified" to participate safely in the RN training program. The fact that her handicap made her unqualified does not mean that she was discriminated against or excluded because of her handicap. She was excluded solely because she was not qualified in the physical sense, physical disqualification being a quite different concept than a physical handicap. Any other conclusion would force upon the nursing profession and upon the untold thousands who need nursing care one who is not fully qualified to provide safe care.

II

In remanding the case to the District Court for further proceedings, the Fourth Circuit suggested that the District Court give "close attention" to respondent's claim for some sort of "affirmative relief" under Section 504 and certain H.E.W. regulations – particularly those dealing with modifying the academic requirements of an educational program and providing auxiliary aids for students with impaired sensory skills.

Even assuming that Section 504 authorizes some forms of affirmative action or relief, no such action or relief is appropriate in the circumstances of this case. Where, as here, the handicapped person has been found physically unqualified for participation in a clinical and physically demanding program, no amount of academic requirement modification can hope to make the applicant physically qualified. Nor can the use of auxiliary aids serve to overcome a serious and uncorrectible physical incapacity, particularly where the applicant is already using all known aids for a hearing deficiency.

What the respondent is really seeking is to be excused from those clinical courses and exercises in which she can-

not safely participate because of her hearing defect. In effect, she is seeking to become a poorly trained nurse, one who cannot adequately perform or even be trained to perform the essential physical skills of the RN profession. The concepts of affirmative action and of reasonable accommodation are simply not designed to assist any desire of a handicapped person to avoid the physical demands of a training program or of a profession.

III

Section 504 creates no express or implied right of action, at least before available administrative remedies have been exhausted, under the circumstances of this case.

The Fourth Circuit's determination that lower court precedent, particularly that created by the Seventh Circuit, dictates that a pre-administrative private right of action can be implied under Section 504 needs reexamination and correction. Neither the language nor the legislative history of Section 504 justifies such an implication. Indeed, the Seventh Circuit precedent relied upon, *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), contained the seeds of its own demise, for it recognized that if and when H.E.W. were to create some form of administrative remedy, such remedy would have to be exhausted before any private right of action could be implied. Some four months subsequent to the *Lloyd* decision, the H.E.W. did issue regulations that provide administrative remedies for individual claims of handicap discrimination or exclusion under Section 504.

Moreover, much of the search for an implied right of action under Section 504 has been mooted by the passage of the 1978 Amendments to the Rehabilitation Act. The new Section 505 of the Act recognizes that a private right of

action might be possible in a very narrow situation involving employment discrimination against a handicapped person pursuant to Section 504. Such a provision necessarily excludes private rights of action respecting exclusion of a physically unqualified handicapped person from a federally funded program or activity that is not primarily designed to provide employment in the program.

In any event, if any private right of action is to be implied under the circumstances of this case it must be of a post-administrative nature. The availability of H.E.W. review and possible correction of any individual claims of program discrimination against the handicapped makes applicable the principles of exhaustion of administrative remedies and of primary jurisdiction. The respondent here has made no attempt to exhaust her administrative remedies, and her court action must be dismissed as premature.

Finally, because the duty of federal fund recipients not to discriminate against the handicapped is so intimately involved with federal termination of funds where undue discrimination or exclusion of the handicapped has occurred, it is wise to siphon all individual complaints in the first instance to the agency entrusted by Congress to administer and implement the Section 504 obligations. Federal courts are ill-equipped to deal with such major policy matters in the first instance.

ARGUMENT

I

Section 504 of the Rehabilitation Act permits denial of admission to a RN nursing program of an applicant whose handicap prevents her from being qualified to render safe nursing services.

The core issue in this case concerns the interpretation and application of Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. §794. In pertinent part, Section 504 reads:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handi cap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

The interpretative problem is this: What did Congress mean when it used the words "otherwise qualified handicapped individual" in Section 504? Is an individual "otherwise qualified" if the handicap itself prevents him from being totally or satisfactorily qualified? Can the capacity to function fully, safely and satisfactorily in a given program or activity be established as one of the qualifications to be satisfied by all applicants and participants, including those who are handicapped? Or must the handicap be entirely disregarded in assessing the individual's qualifications for a particular program or activity that requires the full use of all physical faculties for safe performance? In that context, are the handicapped person's qualifications to be assessed solely by academic or other non-physical standards? In sum, what role does the handicap itself play in determining whether a handicapped individual is "otherwise qualified" with-

ing the meaning of Section 504?

All these interpretative questions are posed in the context of applying the Section 504 language to a RN nursing school applicant whose hearing defect has been found so serious as to prevent her "from safely performing in both her training program and her proposed profession." Pet. App. 20a; 424 F. Supp. at 1345. The answers to such questions must therefore be an amalgam of the following factors: (1) congressional intent; (2) common sense; (3) the concerns of the handicapped; (4) the concerns of the public interest; (5) the concerns and the safety of those patients who would be under the nursing care of the handicapped applicant; and (6) the concerns of the institutions that provide federally funded programs and activities that are available to the handicapped.

A. The language of Section 504

Given the intrinsic difficulties of language, the first step in any analysis and interpretation of a statute is to read the words used by Congress, and to ascribe to those words their common meaning. As Mr. Justice Holmes once wrote, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

The District Court below used a "common sense" approach in reading the words of Section 504. See Pet. App. 19a-20a; 424 F. Supp. at 1345. Applying what it called the "ordinary common meaning" to the words "otherwise qualified," a meaning derived from Webster's Third New International Dictionary, the court read this language to be of a qualifying nature and

> . . . to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap, renders the person unable to fully and effectively participate in the activity. . . . Otherwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available.

In other words, an "otherwise qualified" handicapped individual is one who, despite his handicap, is fully qualified in all respects. The handicap is simply not a disqualification *per se*; but neither does the handicap relieve the individual from meeting all the qualification standards.

As illustrated by the result reached by the Fourth Circuit, another and perhaps more literal reading of Section 504 can be had, a reading that effectively removes the physical handicap from the scope of the "otherwise qualified" language. A person is to be considered "otherwise qualified" and thus admissible to a federally funded program if he or she is qualified in all respects other than, and without regard to, the handicap.

The Fourth Circuit did not reach this result by engaging in statutory semantics or doing its own reading of the Section 504 language. Rather it relied upon a selective and questionable reading of certain H.E.W. regulations and explanations of the statutory words, which had been released some time after the District Court's decision.[3] In effect,

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[3] The Fourth Circuit placed its main emphasis on an H.E.W. regulation (45 C.F.R. §84.3(k)(3)) that defines not an "otherwise qualified handicapped individual" but a "qualified handicapped person." The

the Fourth Circuit held that the administrative reading of the "otherwise qualified" language should take precedence over a prior and assertedly inconsistent judicial reading. Thus the District Court was held to have "erred" when (1) it found that respondent Davis was not "otherwise qualified" pursuant to Section 504, and (2) it considered the nature of Davis' handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program. And by substituting what it felt was the H.E.W. interpretation of the Section 504 words, the Fourth Circuit concluded that the focus of Section 504 in this case should have been "upon her academic and technical qualifications as required by the newly promulgated regulations." For that reason, said the Fourth Circuit, the petitioner College "must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability." Pet. App. 5a-8a; 574 F.2d at 1160-1161.

However obtuse this technique of reading the plain words of a statute, the reading that emanates from the Fourth Circuit's opinion may be stated thusly:

H.E.W. finds it necessary to omit the word "otherwise" in reading the key words of Section 504, in order to avoid an absurd reading of Section 504 which Congress did not intend but which the Fourth Circuit inadvertently incorporated in its decision. It is in that context that the H.E.W. defines a "qualified handicapped person" to mean one who "meets the academic and technical standards requisite to admission."

The Fourth Circuit also noted the H.E.W.'s official explanation of this reference to "technical standards" – as referring "to all nonacademic admissions criteria that are essential to participation in the program in question." See 45 C.F.R. Part 84, App. A, p. 377. The Fourth Circuit apparently assumed, since the H.E.W. explanation of "technical standards" stops at this point, that a physical handicap cannot implicate a technical or nonacademic standard of physical fitness that may be essential to participation in the program in question.

> No handicapped individual, who is "otherwise qualified" without regard to the handicap, shall be denied admission to, or excluded from participation in, any federally funded program "solely by reason of his handicap."

Under that reading, a severely handicapped person who is "otherwise" academically qualified could not be found physically unqualified from participating in any kind of program, no matter what physical qualifications might be essential to safe and effective performance.

As an exercise in applying the "ordinary principles of English prose," *Flora v. United States*, 362 U.S. 145, 150 (1960), the District Court's reading of Section 504 is more reasonable and more meaningful than that of the Fourth Circuit. The ordinary dictionary meaning of the words "otherwise qualified handicapped individual" conveys the thought that the handicapped individual must be "otherwise qualified," i.e., must in all "other respects" have complied with the "specific requirements or precedent conditions" for participation in a given program or activity.[4] In other words, the handicapped individual, like his non-handicapped counterpart, must satisfy all the qualifications (including any of a physical nature) that may reasonably have been set for the program in question.

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[4] Webster's Third New International Dictionary defines "otherwise," when used as an adverb, to mean "in other respects." The adjective "qualified" is defined to mean "having complied with the specific requirements or precedent conditions (as for an office or employment)." Putting these definitions together with the other important words of Section 504 produces the following: an individual who is handicapped but who in other respects has satisfied the specific requirements or precedent conditions for participation in a federally funded program or activity shall not be excluded from participation solely by reason of the handicap.

If there is any grammatical difficulty in so reading these words, it stems from the adverbial use of "otherwise."[5] But that difficulty need not detain us long. As used here, "otherwise" modifies the adjective "qualified." But the modification is not by way of excluding any kind or number of qualifications. Rather the modification is in the nature of setting apart the whole notion of qualifications from the statutory subjects of handicaps and discrimination. Such a usage of the word "otherwise" makes it an all-inclusive one with respect to any qualifications that a handicapped person must satisfy in seeking to participate in a particular program or activity. Whatever his handicap, the handicapped individual must be "otherwise" totally qualified. To read "otherwise" in any other manner would impute to Congress the absurd intent to relieve all handicapped individuals of any physical qualifications and to mandate their eligibility to participate in all programs and activities requiring high physical skills, provided only that they be academically qualified.

Moreover, the Section 504 use of the words "otherwise qualified" appears to be a typical legislative technique for making certain, in the course of establishing a new duty or protection with respect to a disadvantaged clas. of indi-

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[5] It has been noted that "otherwise" is a useful, even an indispensable adverb, provided that the context makes clear which of several meanings it carries. Follett, *Modern American Usage* 256 (1966). Section 504 uses the word clearly to mean "in other respects or circumstances," thus avoiding the various ambiguities that can accompany its usage. See also Nicholson, *A Dictionary of American-English Usage* 398 (1957); Fowler, *A Dictionary of Modern English Usage* 425 (2d ed. 1965).

The H.E.W. has sought to avoid the seeming difficulty with the use of the adverb "otherwise" by deliberately omitting it from its explanatory analysis of Section 504, "in order to comport with the intent of the statute." See 45 C.F.R. Part 84, Appendix A, p. 376.

viduals affected by some scheme or activity, that all relevant and lawful requirements or qualifications for participation in that activity, be recognized and that they remain applicable to the beneficiaries of the legislative command. For example, in *United States v. Mississippi,* 380 U.S. 128, 138 (1965), the Court dealt with a provision in the Civil Rights Act of 1870 (42 U.S.C. §1971(c)) that guaranteed the right of citizens "who are otherwise qualified by law to vote at any election" to be allowed to vote in state elections without distinction of race or color. The Court held that the "otherwise qualified" phrase "obviously meant that Negroes must possess the qualifications required of all voters by *valid* state or federal laws." 380 U.S. at 138. Congress said that, while the right to vote regardless of race was guaranteed, the black voter must still satisfy all the valid voting requirements imposed on all voters. Likewise, Congress has here said that, while the right to be free from handicap-discrimination is guaranteed, the handicapped individual must still satisfy all the valid or reasonable qualifications imposed on all participants in a particular program or activity. See also *Immigration Service v. Errico,* 385 U.S. 214 at 229 (1966) (dissent of Stewart, J.), dealing with the statutory phrase "otherwise admissible."

The sensibleness of this reading of "otherwise qualified" is enhanced by the accommodation that such an interpretation can make to the varying qualifications with respect to different programs and different individuals. One of the main difficulties with the Fourth Circuit's approach to these statutory words is not only its confusing assimilation of physical handicaps into the concept of physical qualifications but its wholesale elimination of physical handicaps as a basis for determining whether a rational requirement of physical fitness for a particular program has been satisfied. If the determi-

nation below stands, a handicapped person would have to be considered qualified *per se* for all hazardous and physically demanding programs, assuming he meets all academic or non-physical qualifications. True, the handicapped person could be considered fully qualified for a program that rationally involves no physical qualifications, such as a law school or political science program. But the point is that the Fourth Circuit's indiscriminate approach permits no distinction relative to the capacity of a particular handicapped individual to perform the physical demands of a particular program safely and satisfactorily.

We need pursue no further the Fourth Circuit's error in interpreting the "otherwise qualified" language, the error lying in the attempt "to show that the statute does not mean what it says." *United States v. Wurzbach,* 280 U.S. 396, 398 (1930). Suffice it to say that Congress has not said, and did not intend to say, that a handicapped individual need not satisfy whatever physical demands and qualifications a particular program may involve. Programs obviously vary as to the need and scope of physical qualifications, just as individuals vary as their capacity to meet necessary physical qualifications – whether or not they are handicapped. And Section 504, in its use of the "otherwise qualified" language, gives proper recognition to those facts of life.

In another and rather unfortunate context,[6] Mr. Justice Bradley long ago uttered a truism, a principle that is fully applicable as a guide in interpreting the "otherwise qualified"

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[6] The fact that Mr. Justice Bradley applied this principle to support the Court's outmoded and unfortunate conclusion that women constitutionally could be denied the right to practice law does not detract from the efficacy of the principle or its applicability in entirely different contexts.

words. In his concurring opinion in *Bradwell v. The State*, 83 U.S. (16 Wall.) 130 at 142 (1872), he wrote:

> In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence.

In enacting Section 504 and in using the words "otherwise qualified," Congress cannot be said to have rejected that principle. The plain words of the statute approve and perpetuate the principle.

B. The interpretation of Section 504

Nothing in the legislative history of Section 504 or of the Rehabilitation Act as a whole sheds direct light on the intent of Congress in using the "otherwise qualified" language in Section 504. But once Section 504 is read in the context of the entire Act, especially in relation to other statutory references to "qualified handicapped individuals," the conclusion becomes inescapable that Congress never intended Section 504 to mandate eligibility for participation in a physically demanding program by a handicapped person who cannot meet necessary physical qualifications. It is a conclusion fully buttressed by the interpretative regulations issued in 1977 by H.E.W., the agency entrusted with responsibility for establishing standards for compliance with Section 504. See 45 C.F.R. Part 84, §84.1 *et seq.*

Section 504 appears nearly at the end of Title V of the Rehabilitation Act, a title that is labelled "Miscellaneous."[7]

[7] Title V of the Rehabilitation Act appears at 87 Stat. 394 and is codified in amended form at 29 U.S.C. §§791-795.

The content of Section 504 is unrelated to the first four titles of the Act, which are devoted to insuring (1) that rehabilitation services will be delivered to a broad class of handicapped persons, especially those with the most severe handicaps, and (2) that research and rehabilitation technology will be improved under the direction of an upgraded Rehabilitation Services Administration.[8] Despite its "miscellaneous" label, Title V of the Act represents an important development in the recognition and protection of the rights and opportunities of the handicapped, particularly by way of guaranteeing them equal employment opportunities.

The substantive provisions of Title V are much concerned with the employment opportunities of the handicapped in various public and private sectors. Three sections of this title express that concern. Section 501 prohibits discrimination against handicapped employees of federal agencies. Section 503 requires that every federal contract in excess of $2,500 contain a provision that, in employing persons

[8] The first four titles of the Rehabilitation Act are an outgrowth and a consolidation of a long-expressed concern of Congress to help the handicapped through rehabilitation. That concern was first expressed in 1920 in the Vocational Rehabilitation Act (the Smith-Fess Act), 41 Stat. 735, dealing with the plight of World War I handicapped veterans. Major amendments to the Act were made at various times during and after World War II; as amended, the Act became codified at 29 U.S.C. §31 et seq. From the start, Congress was intent upon establishing a federal-state partnership to deal with the manifold problems of vocational rehabilitation of the handicapped, to the end that they might be rendered fit to engage in remunerative occupations and to live more normal lives. The Rehabilitation Act of 1973 repealed all the provisions and amendments of the Vocational Rehabilitation Act, and substituted its own provisions. See 29 U.S.C. §790.

All of this history is detailed in S.Rep. No. 93-318, 93d Cong., 1st Sess. (1973), reprinted in [1973] U.S.Code Cong. & Ad. News 2076, 2082-2090.

to carry out the contract, the private employer "shall take affirmative action to employ and advance in employment qualified handicapped persons."[9] Section 504, to the extent that it is deemed applicable to federally authorized jobs programs or to the employment practices of other federal aid recipients,[10] imposes a broad negative duty, a duty not to exclude or discriminate against the handicapped employee or applicant for employment. Together these three sections have been described as "the most significant legislative step taken thus far to guarantee them [the handicapped] equal employment." Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 Amer. U.L. Rev. 31, 41 (1977).[11]

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[9] The implementing regulations of the Department of Labor's Office of Federal Contract Compliance Programs also require that the affirmative action clause in each contract state that the contractor will not discriminate against any employee or applicant for employment "because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified." 41 C.F.R. §60-741.4.

[10] The Fourth Circuit has recently held that Section 504, which is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d to 2000d-6, extends to the employment practices of aid recipients only where a primary objective of the federal aid is to provide employment. *Trageser v. Libbie Rehabilitation Center*, 18 F.E.P.Cases 1141 (4th Cir., Dec. 18, 1978). See also Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L. J. 65, 66, n. 6 (1977); Note, *Equal Employment and the Disabled: A Proposal*, 10 Colum. J. L. & Soc. Prob. 457, 468 (1974).

[11] During the congressional debate on Section 504, Senator Randolph noted that it constituted an attempt to "expand the vistas of opportunity for the handicapped individuals." 119 Cong. Rec. 24587 (1973). Senator Harrison Williams, a co-sponsor of Section 504, stated that Congress thereby intended to "bring the force of the Federal Government to bear in remedying discrimination against handicapped persons." Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies under the Rehabilitation Act of 1973: Hearings before the Subcomm. on the Handicapped of the House Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. 1502 (1976).

But the Section 504 duty not to discriminate solely by reason of a handicap extends far beyond the employment sector. Congress has expressly imposed this duty on those who administer "any program or activity receiving Federal financial assistance." The H.E.W., in its 1977 regulations implementing Section 504,[12] has identified four major types of programs and activities where the nondiscrimination duty applies:

(1) Employment practices.

(2) Preschool, elementary, secondary and adult education programs and activities.

(3) Postsecondary education programs and activities, including vocational education programs and activities.

(4) Health, welfare, and other social service programs and activities.

The instant situation falls within the above category (3). Petitioner's Associate Degree Nursing Program, to which respondent Davis sought admission, is a postsecondary education program. But it is something more than a postsecondary *academic* program. It is a postsecondary *clinical training* program, much like an apprenticeship. The nursing students are given "on-the-job" clinical RN training. As students, they perform precisely the kind of physical and mental tasks – including safe nursing care of bedridden patients – that they will be expected to perform once they secure licensure and employ-

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[12] See 45 C.F.R. Part 84, Subparts B, D, E and F.

ment as RNs. And since the RN must be totally qualified, physically and mentally and academically, to perform safely all essential functions of a RN, the applicant for the training program must be equally qualified to perform such functions. Only by training those who are fully qualified can the State license RNs who are able "to safeguard life and health." N.C.Gen.Stat. Ch. 90, Art. 9, §90-167 (1975).

In the context of this kind of a postsecondary clinical program, it becomes reasonable and indeed essential that the physical qualifications for safe participation in the clinical training program be identical with those needed for safe performance of the essential functions of the RN professional. A fully qualified RN is spawned by a fully qualified trainee. And by a like token, it becomes reasonable and indeed essential that Section 504's reference to the "otherwise qualified handicapped" applicant for a clinical nursing program be read consistently with the various legislative and administrative references to a "qualified handicapped" employee or applicant for employment – such as a RN employee or an applicant for RN employment. Otherwise Congress would be guilty of an absurd intent to force the training of handicapped individuals who are physically unqualified to perform the job for which they have been "trained." The concerns which this Court has recognized in "safe and efficient job performance," *Dothard v. Rawlinson*, 433 U.S. 321, 331, n. 14 (1977), would then be cast aside as respects safe and efficient job training.

Congress has exhibited no such absurd intent. Perhaps the best illustration of congressional concern and intent that a person's handicap not be disregarded in considering employment qualification is Section 503 of the Rehabilitation Act, 29 U.S.C. §793. The affirmative action promise there extracted from federal contractors relates to the employment of handicapped individuals, but only those who

are "qualified." As the administrative implementation of this "qualified" concept makes clear,[13] Congress was expressing a desire that business necessities and safe performance requirements not be sacrificed for the sake of expanding the employment vistas of the seriously handicapped. Thus, stitching together various interpretative regulations issued by Section 503's enforcing agency, the Labor Department's Office of Federal Contract Compliance Programs (OFCCP), produces the following profile of a "qualified handicapped individual" within the meaning of Section 503:

A qualified handicapped individual is one who

(1) Has a physical or mental handicap that substantially limits one or more of such person's major life activities (41 C.F.R. §60-741.2), and

(2) Is likely to experience difficulty in securing, retaining or advancing in employment because of the handicap (41 C.F.R. §60-741.2), and

(3) Is able, despite that handicap and difficulty, to perform a particular job, "with reasonable accommodation to his or her handicap" (41 C.F.R. §60-741.2), but

(4) May still be screened out by the employer, upon a review of the individual's physical or mental job qualifications, provided that the qualification requirements are "job related and are consistent with business necessity and the safe performance of the job" (41 C.F.R. §60-741.6(c)(1) and

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[13] Administrative interpretations of a statute by the enforcing agency, if supported by the statute and its legislative history, are "entitled to great deference" as "expressing the will of Congress." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), and cases cited.

(2)). The qualification requirements must also be related "to the specific job or jobs for which the individual is being considered" (41 C.F.R. §60-741.6 (c)(2)).

In other words, the legislative intent in the Section 503 federal contractor sector has been translated to include a desire to retain all job related physical and mental qualifications, at least if they are consistent with business necessity and the safe performance of the job. If a particular handicapped job applicant cannot meet those job qualifications and thus cannot safely perform a particular job, even assuming reasonable accommodation to the handicap, Congress has not made the equal employment opportunity mandate applicable in that situation. Congress has simply not repealed all or any reasonable job qualification standards. It is inconceivable that anyone could suggest that Congress meant to effect such a repeal when it used the identical "qualified handicapped individual" language in Section 504, particularly as Section 504 relates to a federally funded job training program. If reasonable qualifications for a particular job may be enforced consistently with Section 503, those same qualifications would appear enforceable in a Section 504 program designed to train and prepare individuals for that particular kind of job.

Indeed, there is a certain universality to this congressional intent not to interfere with job related qualification standards. It is evident whenever Congress deals with matters of employment discrimination. There is no known instance where Congress has insisted that reasonable job qualifications be waived whenever the applicant is a member of a preferred or disadvantaged class.

An outstanding contrary instance is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h). That statute

makes it an unlawful employment practice to adversely affect an employee's status on account of race, color, religion, sex, or national origin. In assessing that statute, this Court has recognized that Congress did not thereby "guarantee a job to every person regardless of qualifications . . . [or] command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). And as the *Griggs* opinion further noted, 401 U.S. at 434, Title VII was designed by Congress (a) to protect the employer's right to insist that all prospective applicants meet the applicable job qualifications, and (b) to promote hiring on the basis of job qualifications, rather than on the basis of race or color.

Even within the confines of Section 504 of the Rehabilitation Act, as interpreted by the H.E.W., one can find substantial confirmation of this consistent legislative desire to retain and indeed promote all reasonable job related qualifications in the process of protecting a disadvantaged group like the handicapped from the evils of discrimination. With respect to the employment practices of those job related programs and activities subject to Section 504, the H.E.W. has defined "qualified handicapped person" to mean

> . . . a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question. [45 C.F.R. §84.3(k)(1)]

From that definition it follows that a handicapped person who, even with reasonable accommodation, cannot perform safely the essential functions of a particular job cannot be deemed qualified for that job. It would also follow that such a person cannot be deemed qualified to participate in

a program designed to train one to perform the essential functions of that job. But the essential point is that by the very use of the word "qualified" in Section 504, Congress obviously intended that job qualifications be respected and enforced wherever relevant. The H.E.W. regulation merely carries out that intent with a bit more specificity.

The final piece in this interpretative puzzle is an understanding that different kinds of Section 504 postsecondary education programs can involve different kinds of qualifications. A purely academic program, such as a political science or a legal education program, mainly begets academic qualifications; physical handicaps play virtually no role in establishing one's qualifications and capacity to perform the essentials of academic pursuit, though some degree of reasonable accommodation and physical assistance may be necessary in individual cases. But there are some programs, of which medical and nursing programs are prime examples, that are primarily designed to prepare the participants for employment in fields of endeavor that involve high degrees of physical and mental skills. While academic training forms a part of such programs, a prime emphasis must be placed on clinical activities identical to those which the future licensed doctor or nurse will perform.

In every sense, such postsecondary professional training programs call for the same physical and mental qualifications that are needed for entry in the professions themselves. And there is no more indication in Section 504 that Congress meant to eliminate physical qualification standards for participation in clinical training programs than there is with respect to the qualifications reasonably related to performance as an employed doctor or nurse. On the contrary, a proper reading of the relevant H.E.W. interpretative regulations – in the setting of professional clinical training programs – confirms a legislative intent to maintain appropriate

qualification requirements for entry and participation in such programs.

Thus in 45 C.F.R. §84.3(k)(3), the H.E.W. has defined the term "qualified handicapped person" to mean

> (3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

In its explanatory analysis of §84.3(k)(3), the H.E.W. has stated (45 C.F.R. Part 84, Appendix A, p. 377):

> Section 84.3(k)(3) . . . defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

The Fourth Circuit literally underscored the §84.3(k)(3) reference to the otherwise handicapped person meeting both "academic and technical standards." And it quoted without comment the H.E.W. explanation that "technical standards" refer to "all nonacademic admissions criteria." But the court inexplicably ignored the obvious – the fact that physical qualifications may and perhaps must be among the technical or nonacademic admissions criteria where the postsecondary program, in its clinical aspects, demands a full degree of physical dexterity and skill.[14]

[14] Defining the §84.3(k)(3) reference to "technical standards" as including physical qualifications for participation in a postsecondary clinical program finds a counterpart in the §84.3(k)(1) reference to the employment qualification of being able to "perform the essential functions of the job in question."

The obvious fact that physical qualifications can play a role in the admissions criteria of a clinical training program is confirmed by the H.E.W.'s own explanation of the §84.3 (k) reference to "qualified handicapped person." In its analysis of §84.3(k), the H.E.W. has explained (45 C.F.R. Part 84, Appendix A, p. 376):

> 5. "*Qualified handicapped person.*" Paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

As if to emphasize still further that the ability to participate successfully in an educational program partakes of an enforceable qualification for admission thereto, the H.E.W. has made the same point as respects persons handicapped by being drug addicts or alcoholics. In an explanatory comment, the H.E.W. has indicated that such a handicapped person may be excluded from participation in a Section 504 education program only if his condition makes it impossible for him to "successfully participate in the education program." 45 C.F.R. Part 84, Appendix A, p. 376.

The totality of these H.E.W. analyses of Section 504 confirms the accuracy of the District Court's reading of the "otherwise qualified" language. That reading, moreover, is consistent with what the H.E.W. deems to be the intent of Congress in using these words. In sum, Congress intended that physical qualifications be maintained and applied to applicants for admission to postsecondary education programs, at least where physical skills and dexterity are essential to safe participation in the program.

Any other conclusion, to use the H.E.W. hypothetical, would lead to the absurd result of treating a blind person, who has all the qualifications for driving a bus except sight, as "otherwise qualified" either for the job of bus driving or for admission and participation in a federally funded bus drivers' training program. Only slightly less absurd is the result that has been reached in this case. A seriously deaf person, who presumably has all academic and technical qualifications to be a Registered Nurse except for the hearing handicap, has been judicially declared "otherwise qualified" to be admitted to a training program in which she cannot safely participate.

C. The application of Section 504

A case by case analysis has been said to be "the more appropriate and realistic method for determining whether a handicapped person is 'qualified' for protection" under Section 504. Note, *Rehabilitating the Rehabilitation Act of 1973,* 58 B.U.L.Rev. 247, 262 (1978). It thus becomes appropriate and realistic to assess the facts of this particular case to determine the propriety of the District Court's conclusion that respondent Davis was not "qualified" for participation in the petitioner's Associate Degree Nursing Program.

The short answer to that inquiry is that the District Court was correct. It proceeded on the correct premise that Section 504 was in no way designed to lift any physical qualifications necessary for safe performance in a clinical training program. And it properly found that such qualifications were not met by an individual whose severe hearing loss made safe performance impossible. The Fourth Circuit in no way disputed or disagreed with that ultimate and critical finding of the District Court.

The considerations that support the decisive finding of the District Court may be stated as follows:

(1) The petitioner College's Associate Degree Nursing Program is designed solely "to train people for licensing as Registered Nurses pursuant to the statutes of North Carolina." Finding 4. The licensing authorities of North Carolina make no independent or *de novo* physical examination of applicants for RN licensure; nor do they test such applicants in clinical settings.[15] Thus the responsibility for screening out those who are physically unqualified and incapable of safely performing clinical RN tasks lies exclusively with the College administrators of the Associate Degree Nursing Program.[16]

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[15] Under North Carolina law, as in all other States, an applicant for RN licensure need only take and pass a written examination, testing the applicant's "knowledge of nursing and related material basic to nursing." N.C.Gen. Stat. Ch. 90, Art. 9, §§90-168, 90-169 (1975). To qualify to take that examination, the applicant must (a) be of good moral character, (b) be a high school graduate, and (c) have completed the course of study and have graduated from an accredited educational unit in nursing. §90-170.

[16] To be accredited, the educational unit must establish an admission screening policy that includes "an evaluation of emotional and physical health status as well as scholastic attainment and personal characteristics." *Standards for Educational Units in Nursing*, adopted by the North Carolina Board of Nursing (1967), in effect at the time the respondent sought admission to the Associate Degree Nursing Program in 1974.

See also the petitioner's admission criteria (App. 110a-115a), which include the requirement that the student's application folder contain a medical record (App. 112a). It is also there stated that "serious consideration [will be] given to existing health problems" (App. 112a).

(2) The District Court's conclusion that Davis' handicap would prevent her from safely performing "in both her training program and her proposed profession" reflects one basic fact – that the student must safely perform within the Associate Degree Nursing Program all the physical and clinical tasks that a licensed RN must be capable of performing. By law, a licensed RN must be capable of performing "any act" in the "observation, care, and counsel of persons who are ill, injured, or experiencing alterations in normal health processes."[17] Obviously, those "acts" involve the use of both physical and mental skills; and in many bedside and operating room situations, the nurse's auditory and other sensory skills play an important and sometimes crucial role. Those are the on-the-job "acts" that constitute so much of the clinical training program.

Hence the training program exists primarily to train and prepare the RN trainee to perform "any act," including emergency acts, that the RN professional may be called upon to perform. Only by such a training program can the College certify to the state licensing authorities that a graduating RN candidate can practice "safe nursing." App. 71a. For that reason, the Associate Degree Nursing Program must incorporate substantial clinical experiences with actual patients in all types of hospital settings. As was stated by a lead instructor in that program (App. 71a):

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[17] See N.C. Gen. Stat. Ch. 90, Art. 9, §90-158(3)(a).

> We are not preparing a student, we are preparing a graduate. This is a person who is going to go out to practice nursing. When we are working in our school we are not preparing a student nurse, we are preparing a graduate nurse who can practice safely.

And in preparing a graduate nurse, the nursing program must be able to certify that the individual can practice all nursing skills safely – not just some skills or not just those where auditory perfection is immaterial. See App. 71a. There are, in short, no partially skilled RN professionals. There are no partial RN licenses. There are no nurse-patient situations where the health or safety of the patient should be jeopardized by the physical inability of the nurse to hear a faint cry for help. It follows that no individual, whatever her academic qualifications, should be accepted for RN training if she is physically incapable of performing all necessary nursing skills.

(3) As reflected by the District Court's conclusions, it is absolutely essential to the safety and well-being of patients that the RN professional and the RN trainee assigned to provide nursing care be physically able to cope with all kinds of patient needs and emergencies. And to that end it is necessary that she have available and in good working order all her human lines of sensory communication and perception. While not every nursing situation is a life and death matter, little imagination is required to project innumerable hospital scenes where a nurse with a serious hearing defect could constitute a hazard to the patient.[18]

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[18] Without a keen auditory sense, a nurse might not detect a slight but significant change in a patient's breathing or snoring pattern. Such auditory skills would be particularly important in attending infants and

But the hazards that such a nurse might pose to the patients might also constitute hazards to the nurse herself, as well as to those who supervise or train her. Nurses and nurse trainees are legally responsible for safe performance of the functions within their sphere. Like doctors, nurses run a constant risk of malpractice and negligence claims. See, generally, Lesnik, *Nursing Practice and the Law* 234-304 (2d ed. 1962). It is precisely in the area of the professional nurse's continuing duty to observe, to see and to hear a patient's symptoms and reactions, and then to take whatever action is deemed necessary for the patient's immediate safety, that legal liability for lack of due care most often arises. *Ibid.*, 264-268, and cases cited. And the negligence of a RN trainee can legally implicate the supervisor or administrator of the training program.[19]

The District Court's conclusion that the respondent's serious hearing handicap would prevent her from properly and safely participating in the Associate Degree Nursing Program – as well as functioning ultimately as a RN – is more than adequately supported by the record. By any conceivable standard of proof, the petitioner College bore its burden of proving that its physical qualifications were substantially related to the safe performance of both the training program

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critically ill patients who cannot talk. A deaf nurse might also have difficulty in detecting fine changes in a heartbeat. In an operating room, as the District Court observed, a deaf nurse who depended on lip reading to receive directions would be largely useless, since everyone wears masks over their mouths.

[19] See also N.C.Gen.Stat., Ch. 90, Art. 9, §90-171.5 (1975), which authorizes the North Carolina Board of Nursing, after notice and hearing, to revoke or suspend any license to practice nursing if it determines that, *inter alia*, the nurse is unfit or incompetent to pratice nursing by reason of negligence or habits, or is mentally or physically incompetent to practice nursing.

and the subsequent professional activity. Cf. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 861-863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122; *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976). And see *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972), holding that the burden to show that employment qualifications are job related is lighter "when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great."

Indeed, the District Court's findings of fact have not been seriously contested by the respondent. Her hearing handicap is conceded, and her hazards to patients and to herself have not seriously been contested. Her major claim to date is that she has performed certain nursing functions as a LPN and that she can do certain acts within the realm of the RN.[20] But there are seeming provisos attached to that claim, for she must continue to use her hearing aid and she must continue to read lips for effective communication. And she is now apparently seeking additional kinds of special training, as well as individual supervision in her projected RN rounds.

Such a conditional claim misconceives the nature of the RN profession. It is a profession heavily involved with public health and safety. Nurses must be capable of providing

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20 It has been said that the "vital distinction between practical [LPN] and professional [RN] nursing is that by training and skill the professional nurse is obligated to interpret and evaluate facts in order to ascertain essential action that may be required. . . . It would seem that where the practical nurse exercises functions properly in the province of the professional nurse, she is engaged in an unlicensed and illegal activity." Lesnick, *Nursing Practice and the Law* 285 (2d ed. 1962).

total nursing care, rather than a care somehow modified to fit the physical handicaps of the nurses.

The conclusion is inescapable. The respondent Davis, with her hearing handicap, is simply not "otherwise qualified" within the meaning of Section 504. She is not "qualified" to participate safely in the RN training program. Any other conclusion would force upon the nursing profession, and upon the untold thousands who need or will need safe and competent nursing care, one who is not fully qualified to provide safe care.

II

Section 504 does not contemplate or authorize any kind of "affirmative relief" under the circumstances of this case.

The Fourth Circuit, in remanding the case below for further proceedings, suggested that the District Court give "close attention" to respondent's claim for some sort of "affirmative relief" under Section 504 and under certain H.E.W. regulations.[21] The Fourth Circuit rather cryptically added that precedent "supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive." Appendix A of petition for certiorari, pp. 8a-9a; 574 F.2d at 1162.

These comments of the Fourth Circuit must be assessed in light of (1) its ruling on the "otherwise qualified" language of Section 504, and (2) the meaning and impact of any "af-

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21 The respondent pointed to five specific H.E.W. regulations: 45 C.F.R. §§84.42(a); 84.43(c); 84.44(a); 84.44(d); 84.12(a). The Fourth Circuit's opinion made particular reference to two of these regulations, and quoted from them: §84.44(a), dealing with modifications of academic requirements; and §84.44(d)(1), requiring that a recipient provide educational auxiliary aids for those with impaired sensory skills.

firmative relief" in the context of the undisputed facts of this particular case. Either avenue of inquiry leads to the conclusion that any form of "affirmative relief" is unwarranted in the statutory and factual circumstances.

At the outset, it must be emphasized that Section 504 imposes a broad duty on federal aid recipients not to discriminate against the handicapped solely because of their handicaps. But that duty is carefully limited by the section to what is described as the "otherwise qualified handicapped individual." If the handicapped person has been found "otherwise qualified" to participate in a federally funded program despite a handicap, then it can be said that in some situations a form of affirmative relief or accommodation may be necessary so as to equate the opportunity accorded the qualified but handicapped applicant with the opportunity available to the qualified non-handicapped applicant.[22] But if the handicapped person cannot meet the physical qualifications for the program involved, a question arises whether Section 504 was meant to authorize affirmative efforts either to remove the disqualification or to change the program by lowering or eliminating the qualification standards. In that event, affirmative action would be used to restructure many of the educational and clinical programs and activities that demand a high degree of physical dexterity; or the programs would have to be altered so as to produce physically unqualified graduates, unable

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22 One commentator has suggested that the term "qualified" ordinarily implies the absence of a need for any special accommodation, and that H.E.W. has committed "an error in logic" by imposing upon employers the duty to make reasonable accommodation for handicapped individuals who might in fact be "unqualified." Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. of Balt. L. Rev. 183, 269-270 (1978).

to perform their chosen tasks without endangering themselves or the public safety interests. This problem is more exacerbated in this case by the Fourth Circuit's ruling that effectively cancels all types of physical qualifications for participation in all postsecondary educational and clinical programs.

The Fourth Circuit's decision as to the meaning of Section 504's "otherwise qualified" language not only produces an absurd result but breeds even more absurd and insoluble problems. As indicated in Part I of this brief, the Fourth Circuit has ignored the proposition that Congress intended by Section 504 only to eliminate employment and program practices that exclude handicapped persons who are fully qualified and capable of safely performing the job or activity involved. Congress exhibited no intent to affect or erase physical qualification standards that are reasonably job-related or activity-related. But the Fourth Circuit seemingly held otherwise. And by so doing, that court has created a major problem of what kind of affirmative relief, assistance or accommodation can be used to mask the effect of the handicapped person's physical inability to participate safely. Did Congress design Section 504 so as to generate that kind of affirmative action? Can the concept of affirmative action or relief or accommodation be used to accomplish indirectly what Congress did not want done directly under Section 504 – i.e., eliminate or dilute standards of qualification reasonably related to job or activity performance?

These questions must also be asked against the background of the District Court's fact findings, fact findings that the Fourth Circuit did not disturb or query. Those findings establish that the respondent Davis has a serious hearing defect that renders unsafe her performance of many of the clinical

nurse-patient aspects of the RN training program; and the findings cast serious doubt on whether she ever could perform satisfactorily or safely the clinical tasks of the licensed RN. Serious problems of the patients' health and safety are implicated if the Fourth Circuit's suggestion of affirmative relief means that unqualified and unsafe handicapped nurses must be given the opportunity to be licensed and to serve as RNs. Indeed, what are the implications of this affirmative relief suggestion upon the licensing power of the States to control entry into the RN profession in terms of fully qualified applicants? If the respondent succeeds in the present action, will her next suit have to be brought against the North Carolina nurse licensing authorities to compel them to grant licensure to a physically unqualified RN training school graduate?

It should also be noted that the only kind of affirmative relief that the respondent here seems to suggest is one that would free her from the unfortunate consequences of her dangerous RN disqualification. There are only two possibilities in that respect: (1) she can ask to be excused from taking the clinical training courses in which her hearing handicap presents a safety problem; or (2) she can ask that she be accorded a preferential and personal one-on-one supervision, presumably being accompanied and shadowed at every step by a nursing supervisor or fully qualified aide who could transmit and translate to her each and every sound, word and whisper that might be significant and that she might not otherwise hear or heed. The first possibility seems to have been in the mind of the Fourth Circuit when it pointed to the H.E.W. regulation, §84.44(a), dealing with modifications of academic requirements. The second possibility has already been explored by respondent's counsel during the District Court proceedings. There he made repeated inquiries as to the College's willingness to provide greater supervision of the respondent at every step in the clinical program, presumably on a one-on-one basis. See App. 35a, 46a, 51a-54a, 77a, 92a, 96a. The answer given, of course, was that the College had neither the human nor the financial resources to over-accommodate one unqualified nurse trainee.[23]

Suffice it to say that there is no basis whatever in the language, structure or purpose of Section 504 that would justify a judicial ordering of either of the two consequences of respondent's requests: (1) an order restructuring a professional training program by eliminating the clinical aspects, so that an unqualified handicapped applicant may pursue only those academic courses that present no problem but which leave her quite untrained in the imporatnt clinical aspects of her chosen profession; or (2) an order that she be provided a preferential and protective supervision of a kind that would be totally impractical, counter-productive and financially impossible.

There are serious questions whether any kind of affirmative action can be had under Section 504. By its own terms and by its legislative history, Section 504 is completely silent on the matter. That silence is in sharp contrast to the companion Sections 501 and 503, both of which contain express

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[23] The instructors in the College's clinical training program were usually responsible for from 8 to 12 students in the less demanding clinical areas of the hospital. In the more demanding areas, the ratio was 1 to 4. See App. 46a, 77a, 92a.

When the lead instructor was asked if the College could provide additional supervision for the respondent, presumably on a one-on-one basis, she replied: "Dr. McCarter [the College president] would have to close the college, there is no way we can have that kind and she might, I don't know that could even do it then if she had a one to one, I don't know." App. 77a.

language authorizing some form of "affirmative action."[24] But this enigma of whether Section 504 impliedly authorizes any affirmative action or decree would be augmented tenfold were one to search Section 504 for justification of the drastic and far-reaching kind of affirmative action relief seemingly sought by the respondent and suggested by the Fourth Circuit.

It is apparently true that the concept of "affirmative action" is a fluid one, its nature changing with the context in which it arises. It seems to mean something different in each case, depending on the particular kind of discrimination involved and on whether the discrimination is likely to be cured or prevented through affirmative action. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). One commentator has observed that affirmative action, viewed from one perspective, is essentially a two-tiered concept: (1) it can be required by a court as part of a remedy for proven past discrimination; or (2) it can be required by legislative or executive action as a condition of securing and retaining some financial or contractual relationship with the United States. St. Antoine, *Affirmative Action: Hypocritical Euphemism or Noble Mandate?* 10 U.of Mich.J.Law Reform 28, 29 (1976). See also Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 So. Cal. L.Rev. 785, 801-803 (1976).

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[24] The contrast between the affirmative action provision in Section 503 and the absence of such a provision in Section 504 is heightened by the presence of regulations under Section 503 implementing the congressional call for affirmative action (41 C.F.R. Part 60-741), and the omission of such implementing affirmative action regulations in the H.E.W. regulations under Section 504 (45 C.F.R. Part 84). See Note, *Rehabilitating the Rehabilitation Act of 1973*, 58 B.U.L. Rev. 247, 252-254 (1978).

If there is any central theme in the general affirmative action concept, it is that it reflects a congressional desire to avoid putting or maintaining minority group members at a competitive disadvantage based on their minority characteristics. It is a concept that deals with classes of the disadvantaged, classes that by some sort of affirmative plan or decree can be brought up to a position of equality in opportunity with the competing majority classes. And it is a concept that deals largely with attitudes, majority attitudes toward racial, religious, national origin, sex and perhaps even age minorities. But the physically and mentally handicapped minorities are something quite different. It is more than a question of attitude. Handicaps are highly individualized in nature, and certainly cannot rise above the reasonable job-related qualification standards. Each handicapped individual must be treated as equal only to the extent that he is qualified to perform the job or the activity as to which he seeks equality of opportunity.

It seems useless, therefore, to try to ferret some language or policy out of Section 504 that would permit a court to order a generalized affirmative action program for hiring or admitting handicapped persons as a class, without regard to their individual qualifications or disqualifications. Congress simply did not deal with the problems of the handicapped in those general class terms. Section 504 on its face limits the concern of Congress, at least in the area of federally financed programs and activities, to those handicapped individuals who are "otherwise qualified." It is the fully qualified handicapped individual who must be given equal opportunity to participate in such programs and activities. And because some activities, like some forms of employment, are high risk ventures in terms of physical capacities, the opportunity and the qualification for becoming a participant in such a program cannot be dealt with in a generalized affirmative action way.

To the extent that the Fourth Circuit may have thought that its remand suggestions were justified under any such generalized affirmative action theory, the suggestions must be rejected. Secdtion 504 does not permit the use of that theory as to individual handicapped persons who are unqualified. Nor do these suggestions fare any better if it be thought that a lesser form of affirmative action, like the reasonable accommodation concept embodied in the H.E.W. regulations, can be extracted from the broad language of Section 504. Cf. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331, n. 1 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971). Again, we are met with the immovable fact that this individual, this respondent, has been found by the fact finder to be physically unable to cope with the physical demands of the RN clinical training program. She must be considered unqualified to participate in that program, to say nothing of pursuing a career as a professional RN.

The reasonable accommodation possibilities offered by the H.E.W. regulations do not meet respondent's problem in being physically unqualified. Respondent already has her own auxiliary aids, in the form of hearing aids, and she has not asked the College for additional ones. So the auxiliary aid regulation quoted by the Fourth Circuit, §84.44(d)(1), offers no solution to respondent's qualification problem; even with auxiliary aids, she cannot hope to perform safely or satisfactorily the physical skills needed in the RN clinical training program. And with respect to the other H.E.W. regulation mentioned by the Fourth Circuit, §84.44(a), respondent does not want or need any modifications in the training program's "academic requirements." What she really wants are modifications in the clinical or physical requirements of the program – a subject which is not even addressed by the H.E.W. regulations. And that is

the very heart of this case. Only by seeking a deletion or limitation of the qualification standards can respondent hope to overcome the District Court's findings as to her disqualification and the hazards she poses to the health and safety of others if allowed to participate in the RN training program. But neither Congress nor the H.E.W. has responded to that hope.[25]

The short of it is that no "reasonable accommodation" to respondent's physical disqualification is possible. When the disqualification is due solely to a physical defect, rather than to any intent to discriminate against a qualified handicapped individual solely because of the handicap, there is no kind of affirmative action or reasonable accommodation that can make an unqualified person's capacity or opportunity to participate in a program the equivalent of that of a qualified person.

One final word is in order with respect to the public safety and health aspect of this case, as embodied in the District Court's findings. That factor alone, the danger that a physically ill-equipped nurse poses to the health and welfare of her patients, serves to render reasonable the physical qualifications that have been established for entry into RN training programs and the RN profession. And this factor renders unreasonable any cost the petitioner College might incur in trying to accommodate the RN training program

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[25] In §84.4(b)(2), the H.E.W. has stated that auxiliary aids are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons. Rather, the aids "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." Obviously, such aids cannot help an unqualified handicapped person achieve a level of qualification that his disability, given the assistance of aids, will not permit.

to meet the limited physical capacity of this particular applicant. Any affirmative accommodation in these circumstances becomes "unreasonable" and any hardship incurred by the College becomes "undue." Cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 (1977). Ultimately, of course, such an accommodation infringes upon what Mr. Justice Powell in *Bakke*, 437 U.S. ___, called the "freedom of a University to make its own judgments as to education," which "includes the selection of its student body."

III

Section 504 creates no express or implied private right of action, at least before available administrative remedies have been exhausted, in the circumstances of this case.

The Fourth Circuit determined that the District Court's implicit finding that respondent Davis could pursue a private right of action under Section 504 was "legally sound," citing what it called the "sound reasoning" of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977). Certain other Circuits have similarly cited the *Lloyd* ruling as indicative of the "probable" existence of such an action. *Kampmeier v. Nyquist*, 533 F.2d 296, 299 (2nd Cir. 1977) stating that the *Lloyd* reasoning is "fairly persuasive here" so that it is "probable" that the *Kampmeier* plaintiffs had standing to bring such action); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Leary v. Crapsey*, 566 F.2d 863, 865 (2nd Cir. 1977). Some federal district courts have also cited the *Lloyd* decision in concluding that a private right of action can be implied from Section 504.[26] Other

[26] See *Bartels v. Biernat*, 427 F. Supp. 226, 229-230 (E.D. Wis. 1977); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809, 916 (E.D. Pa. 1977); *Duran v. City of Tampa*, 430 F. Supp. 75, 77 (M.D. Fla. 1977); *Barnes v. Converse College*, 436 F. Supp. 635, 638 (D. S.Car. 1977); *Halderman v. Pennhurst State School*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977); *Camenisch v. University of Texas*, No. A-78-CA-961 (W.D. Tex., May 17, 1978).

district courts have stressed the peculiar facts and timing involved in *Lloyd* and have recognized that a private right of action is "probably" available only under certain circumstances.[27]

But the foundations of the "sound reasoning" of *Lloyd* have been described as tenuous at best and in need of reconsideration.[28] Moreover, there are hard problems raised by the decision below in the instant case that simply were not addressed or answered in *Lloyd*. It would be unfortunate, therefore, if the *Lloyd* rationale were to be allowed to pick up speed as the leading authority for the proposition that Section 504 gives an implied right of action to any and all handicapped applicants who are denied admission to a federally-financed program.

[27] See *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1055 (M.D.N.C. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 203-204 (N.D. Tex. 1977); *Doe v. New York University*, 442 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977); *Sherer v. Waier*, 457 F. Supp. 1039 (W.D. Mo. 1978).

See also the divided district court authorities cited in Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L.J. 65, 98, note 108 (1977); Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 Baltimore L. Rev. 183, 204, note 70 (1978).

[28] Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse*, 29 Mercer L. Rev. 745, 751-756 (1978).

A. Reconsideration of the *Lloyd* rationale

Much of the *Lloyd* rationale is dubious, outdated and in dire need of reconsideration. Thus, after noting that Section 504 tracks Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, the *Lloyd* court asserted that *Lau v. Nichols*, 414 U.S. 563 (1974), held that Section 601 provided a private cause of action – ergo Section 504 provides a cause of action for the handicapped applicant. The difficulty here is that *Lau* made no attempt to discuss or resolve the private right of action issue; the Court simply declared a particular education practice violative of Section 601.[29]

Indeed, the Seventh Circuit itself has repudiated this notion that *Lau* is controlling as to the existence of a private right of action as to a similar analog, Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. In *Cannon v. University of Chicago*, 559 F.2d 1063, 1072 and 1083 (7th Cir. 1976, 1977), both in the original decision and on rehearing, the Seventh Circuit acknowledged (p. 1083) that "*Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI that would mandate implication of a

[29] In *Lau*, the Court held that a public school system's failure to provide English instruction for 1800 students of Chinese ancestry who did not speak English was a denial of an equal educational opportunity and hence violative of Section 601. The suit had been brought as a class action, but the Court did not discuss or confront the problem as to the right to bring such a suit. See 414 U.S. at 568. Mr. Justice Blackmun's concurrence stressed the large number of children involved who were being deprived of any meaningful education. See 414 U.S. at 572. Mr. Justice Stewart's concurrence stated that the critical question at issue was whether certain H.E.W. guidelines and regulations wnet beyond the authority of Section 601. 414 U.S. at 571.

private right of action here under the comparable provisions of Title IX [Section 901]." It would seem equally clear that the Seventh Circuit has repudiated that portion of its *Lloyd* opinion that relied upon *Lau* for the proposition that Section 504 gives rise to a private right of action. *Lau* is no longer thought to provide a precedential base for implying a private right of action under Section 504, or any analogs thereof.

Further elucidation of this matter is likely upon this Court's review of *Cannon*, now awaiting decision by the Court. No. 77-926.

B. No Basis or Need for Implying Private Remedy

Alternatively, the *Lloyd* court held that a private right of action could be had under Section 504 by resort to the doctrine of implication, as developed by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1974). But it is questionable whether the second and third facets of that doctrine,[30] relating to legislative intent, have been satisfied in the case of Section 504. In commenting on the 1974 amendments to the Rehabilitation Act, the Senate Committee on Labor and Public Welfare noted that Section 504 would "permit

[30] In *Cort*, this Court found four factors relevant in determining whether a private judicial remedy is implicit in a statute not expressly providing one: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally related to state law, thus rendering it inappropriate to infer a cause of action based on federal law. 422 U.S. at 78.

a judicial remedy through a private action," but seemingly only after there had been some administrative implementation of a compliance program.[31] There is not a word in Section 504 or in its legislative history that permits or contemplates an independent private action by the handicapped person prior to any kind of administrative action by the H.E.W.

But the passage of the 1978 Amendments has mooted the search for implications of a private right of action under Section 504. Those amendments have made it plain that such a cause of action is available in a very limited situation, thereby excluding the availability of a private remedy in all other situations. And the promulgation of H.E.W. regulations in 1977 has created an administrative path for those in the respondent's shoes to follow before instituting any conceivable court action.

C. Effect of the 1978 Amendments

The 1978 Amendments to the Rehabilitation Act did two significant things: (a) it recognized that certain limited types of private suits might be brought under the Act, including Section 504, but (b) it confirmed the continuing absence of a private right of action under Section 504 in the context of a federally funded program or activity not primarily designed to provide employment. The instant case, of course, falls into category (b).

The new Section 505 of the Rehabilitation Act, added by the 1978 Amendments, makes a sharp distinction between the "remedies, procedures, and rights" which may be

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[31] S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974), reprinted at [1974] U.S. Code & Admin. News, 6373, 6390-6391.

asserted under Section 501 of the Act and those that are available under Section 504. Section 505(a)(1) provides that federal employees aggrieved by some act of discrimination under Section 501 shall have the remedies, procedures and rights set forth in Title VII of the Civil Rights Act of 1964. Section 706(f) of that Act, 42 U.S.C. §2000e-5(f), does give an aggrieved person a private right of action after exhausting prescribed administrative procedures. Hence an aggrieved handicapped federal employee now has a similar cause of action.

But the new Section 505(a)(2) directs those aggrieved under Section 504 not to Title VII but to Title VI of the Civil Rights Act of 1964. And Title VI contains a significant limitation not found in Title VII. Section 604, which is a part of Title VI of that Act, 42 U.S.C. §2000d-3, limits suits by federal departments and agencies under Title VI to those racially discriminatory employment practices by recipients of federal aid where "a primary objective of the Federal financial assistance is to provide employment." The Fourth Circuit, in *Trageser v. Libbie Rehabilitation Center*, 18 F.E.P. Cases 1141 (4th Cir., Dec. 18, 1978), has recently held that this Section 604 limitation applies – by virtue of the new Section 505(a)(2) of the Rehabilitation Act – to complaints brought by aggrieved handicapped individuals under Section 504.

In other words, there can be no private right of action under Section 504 unless a primary objective of funding the program or activity is to provide employment. It cannot here be claimed that a primary objective in giving federal funds to the petitioner College was to provide employment. The primary and indeed the only function of the Associate Degree Nursing Program was to train nurses. And the respondent Davis was in no position to claim any discriminatory employment practice; she was an aggrieved pro-

gram applicant, not an aggrieved job applicant. Thus by the words and logic of the 1978 Amendments we return to the original proposition that, at least in the circumstances of this case, Congress never intended to accord an aggrieved program applicant a private right of action. See also the separate opinion of Mr. Justice White in *Bakke*, 437 U.S.___.

Moreover, the allowance of attorney fees under the new Section 505(b) of the Rehabilitation Act, also enacted as part of the 1978 Amendments, lends no basis for implying a private right of action under Section 504 in these circumstances. The attorney fee provision simply implements the new understanding in Section 505(a) that certain designated causes of action can be brought by federal employees or by the employees or applicants for employment in federally funded work programs.[32] Standing by itself, Section 505(b) does not purport to create or recognize any cause of action not otherwise specified by Congress. To be sure, if this Court were to hold that other kinds of private suits could be implied from the language of Section 504, the attorney fee provision of Section 505(b) is ready to implement that possibility.

During the debates on the 1978 Amendments, several Senators did state that it had been "the continuing intention of Congress" that private actions be allowed under Section

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32 Various *amici* have suggested that this new provision for attorney fees is also consistent with the intent, expressed by a Senate report in connection with the Rehabilitation Act Amendments of 1974, 29 U.S.C. §706, that a recipient of federal financial assistance would have post-administrative judicial review – but that a handicapped individual would have no private right of action in court. Such a recipient would now be entitled to attorney fees if successful in court. See S.Rep. No. 93-1297, 93rd Cong. 2d Sess. (1974), reprinted in [1974] U.S.Code Cong. & Ad.News, 6373 at 6390-6391.

504. See 124 Cong. Rec. S 15590-15593 (Sept. 20, 1978 daily ed.); S.Rep. No. 95-890, 95th Cong. 2d Sess. 19 (1978). Such remarks contribute little if anything to the search for the legislative intent in enacting Section 504 in 1973. They "suggest only that some members of Congress may have assumed that private suits were authorized." *Cannon v. University of Chicago*, 559 F.2d 1063, 1079 (7th Cir. 1977). And since they are expressions by members of a later Congress dealing with a different and subsequent section of the Act, Section 505, they are "entitled to little if any weight." *Teamsters v. United States*, 431 U.S. 324, 354, n. 39 (1977). Whatever force these statements might otherwise carry has been overcome in any event by the plain and limiting words of the new Section 505(a). They simply spoke in terms larger than allowed by the 1978 Amendments then under consideration.

D. Doctrines of Exhaustion and Primary Jurisdiction

The Seventh Circuit permitted a private action in the *Lloyd* case only because no administrative enforcement procedures had at that time been established, an omission that has now been cured. In footnote 29 of the *Lloyd* opinion, 548 F.2d at 1286, the Seventh Circuit stated:

> "We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review . . . . And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . But assuming a meaningful administrative enforce-

ment mechanism, the private cause of action under Section 504 should be limited to *a posteriori* judicial review."

Since a "meaningful administrative enforcement mechanism" was established in May of 1977, the time has come to fill in what was deliberately left open by the *Lloyd* footnote, i.e., to determine that only a post-administrative judicial review is possible under Section 504. Where, as in the instant case, a private suit is brought that is clearly of the pre-administrative variety, it is no longer possible simply to cite the *Lloyd* ruling – as the Fourth Circuit did – as authority for implying a pre-administrative private right of action from the stark language of Section 504. One must now give attention to the fact that §84.61 of the 1977 H.E.W. regulations (45 C.F.R. Part 84) makes the "procedural provisions applicable to Title VI of the Civil Rights Act of 1964" apply to Section 504 claims of handicap discrimination or exclusion. Those Title VI procedures, in turn, are found in 45 C.F.R. Part 81, §§80.6 - 80.10. In particular, §80.7(b) contemplates the filing of an administrative complaint by an aggrieved individual. Presumably the administrative determination could then be subjected to some form of judicial review (see §80.11).

If some sort of private right of action is to be found at the post-administrative stage, the doctrine of exhaustion of administrative remedies, as well as the doctrine of primary jurisdiction, become dispositive of any attempt by a handicapped individual to institute suit at the pre-administrative stage. Several district courts, attempting to follow the implications of the *Lloyd* decision, have barred private suits under Section 504 where the plaintiffs have not exhausted the new H.E.W. administrative remedies dealing with discrimination complaints. *Doe v. New York University*, 422 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977);

and see *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977) (primary jurisdiction).

The Fourth Circuit sought to avoid the implications of the exhaustion and primary jurisdiction doctrines, which had been raised at the rehearing stage, by suggesting that the District Court consider these matters on the remand. See footnote 9 of the opinion below. Just why a remand was necessary to resolve such legal propositions was not made clear. Such matters should and can be considered and resolved as part of the continuing problem of determining what private remedies are available under Section 504 and when they may be invoked.

Since administrative remedies are now available before the H.E.W., extended discussion of the doctrines of exhaustion of administrative remedies (see *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)) and of primary jurisdiction (see *Nader v. Allegheny Airlines*, 426 U.S. 290, 303 (1976)) becomes unnecessary. Those doctrines combine to require that the respondent, as an aggrieved applicant for admission to a Section 504 program, first seek redress through the H.E.W. channels. Whatever private right of action might be found to secure review of the H.E.W. determination could then be asserted.

Requiring such an exhaustion is particularly appropriate in a Section 504 situation because of the obvious connection between federal funding of a program and handicap discrimination or exclusion by the program. The H.E.W. should be alerted in the first instance to an individual claim of discrimination so that it may seek to conciliate and resolve the problem with the program administrators. The ultimate sanction, of course, and one that Congress contemplated, would be a termination of federal funding. Such major problems of policy and judgment should not

be handled in the first instance by the federal courts. They belong in the agency designated by Congress to implement the policies of Section 504.

CONCLUSION

For these various reasons, the judgment of the Fourth Circuit should be reversed, with directions that the judgment of the District Court be reinstated.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 933-5106

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472
(919) 642-7151

Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

SEYMOUR DUBOW
MARC P. CHARMATZ
LARRY J. GOLDBERG
ANDREW S. PENN

THE NATIONAL ASSOCIATION OF THE DEAF LEGAL DEFENSE FUND

P.O. Box 1793
7th Street & Florida Ave., N.E.
Washington, D.C. 20002
(202) 547-0540

PHILIP A. DIEHL
WARREN L. PATE
127 W. Edinborough Avenue
Raeford, North Carolina 28376
(919) 875-3349

Counsel for Respondent

March 31, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the court of appeals held correctly, consistent with Section 504 and the implementing HEW Regulation, that the district court erred in focusing solely on Respondent's handicap to determine whether she was qualified for admission.

2. Whether the court of appeals was correct in suggesting that the district court give close attention on remand to affirmative relief in light of the district court's failure to consider any accommodation for Respondent's handicap.

3. Whether a handicapped individual can maintain a private action in federal court to enforce his/her statutory rights under Section 504.

4. Whether the issues of exhaustion of administrative remedies and primary jurisdiction are properly before this Court when these issues were never raised in the courts below.

STATUTES AND RULES INVOLVED

Section 7 of the Rehabilitation Act of 1973, 29 U.S.C. § 706, as amended:

(6) The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982 (1978) ("the 1978 Amendments").

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded

from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

H.E.W. Regulation implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

§ 84.42 Admissions and Recruitment

84.42(b)(4) In administering its admissions policies, a recipient to which this subpart applies:

Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to

whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

§ 84.43 Treatment of Students: General

84.43(c)

A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

§ 84.44 Academic adjustments

84.44(a)

Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

84.44(d)

Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation

in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

STATEMENT OF THE CASE

Frances Davis is an actively employed, duly qualified, licensed practical nurse (LPN). Her license, issued by the State of North Carolina in 1967, is currently in good standing. (App. 109a).

Mrs. Davis, seeking to advance in the nursing profession, applied in March 1973, to Southeastern Community College for admission as a student in the 1973-74 school term. (App. 116a). Mrs. Davis submitted, as part of her application, a Pre-entrance Medical Record, in which the examining doctor evaluated her as ". . . mentally and physically able to undertake the program in professional nursing," and recommended her for admission. (App. 120a).

On August 17, 1973, the College accepted Mrs. Davis for admission in the 1973-74 school year with the understanding that Mrs. Davis planned to advance to the Associate Degree Nursing Program the following school year. The College advised Mrs. Davis that her "progress would be evaluated at the end of this [1973-

74] school year to determine your acceptance into the nursing program." (App. 123a).

Mrs. Davis successfully completed her courses during the 1973-74 school term. Nevertheless, the College advised her, on May 6, 1974, that she did not qualify for acceptance to the Associate Degree Nursing Program. The College refused to accept Mrs. Davis solely because of her hearing impairment. (App. 77a, App. 129a-130a).

As part of the College's evaluation process, Mrs. Davis was interviewed in April of 1973 and again in March 1974. The College then requested that Mrs. Davis submit to an evaluation of her hearing by an audiologist.

The hearing evaluation indicated that Mrs. Davis has a bilateral moderately severe sensori-neural hearing loss. The audiologist determined that the hearing aid worn by Mrs. Davis "provided little if any help for March 1974. The College then required that Mrs. Davis had been fitted with a new hearing aid:

> . . . which provides her significant improvement in her hearing which approaches normal hearing levels. In other words, while she is wearing the hearing aid, she should be able to hear a talker almost as well as a person would who has normal hearing. However, to effectively understand speech of that talker she must use her vision to supplement her hearing. It is my opinion that she is an excellent lip reader and performs well above what one would expect for a person with this degree of hearing impairment.

(App. 127-128a).

Nevertheless, the College scheduled no further interviews with Mrs. Davis with the new hearing aid. Instead, the College advised Mrs. Davis that she did not qualify for acceptance to its nursing program. (App. 129a-130a).

Mrs. Davis then asked the College to review her application. The College requested an opinion from the Executive Director of the North Carolina Board of Nursing who responded, "We concur with your opinion as stated on the telephone, that Mrs. Davis' hearing disability can preclude her being safe for practice in any setting allowed by a license as a[n] RN, *or by license as a[n] LPN.*"* (emphasis added). (App. 132a). But the Executive Director further stated, "We cannot, at this time, predict eligibility or ineligibility for the licensing examination should Mrs. Davis enroll in, and be allowed to complete the program some several years hence." (App. 139a).

The College also asked the Director of Nursing Services at Southeastern General Hospital whether the hospital would employ her as a registered nurse. (App. 142a-143a). Mrs. Davis had worked as an LPN under the Director of Nursing Services at Southeastern General Hospital. (App. 156a). The Director responded:

> I would employ Mrs. Davis in our Skilled Nursing Facility as an RN if I had a vacancy. . . . We have the New Methodist Home that will be built in the near future that will have positions that I feel she can handle. Mrs. Davis could also handle the night assignment on our Post Partum Units without difficulty after she is registered.

(App. 144a-145a).

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* Evidently the Executive Director did not know that Mrs. Davis had in fact functioned as an LPN for many years.

The Director further stated:

> Mrs. Davis and I have discussed her hearing problem. . . . In areas such as long term care, a doctor's office or even industrial, she could do well. I do not believe that I can truthfully state that she would not be able to function in any area of nursing with her present determination to continue her education.

(App. 140a-141a).

Citing the reports of the audiologist, the Executive Director of the State Board of Nursing, and the Director of Nursing Services at Southeastern General Hospital, the College then rejected Mrs. Davis' request for reconsideration of her application. (App. 146a-148a). Thereafter, she brought this suit.

Testimony at the trial revealed that Mrs. Davis was academically qualified for admission into the nursing program and that her application was rejected solely because of her hearing disability. (App. 77a). The testimony also indicated that there are no physical distinctions in qualifications for a Registered Nurse (RN) and a Licensed Practical Nurse under North Carolina statute. (App. 47a). The testimony further revealed that Mrs. Davis, with an instructor supervising her, could have accomplished all skill levels in the clinical program. But the College did not want to modify its program to compensate for Mrs. Davis' hearing difficulty. (App. 53a). Indeed, the College admitted that it had not developed any curriculum to aid any handicapped students. (App. 86a). Despite these admissions, the College maintained that Mrs. Davis, "was not qualified or suitable for the Associate Degree Nursing Program by reason of her disability." (Pet. App. 17a).

The district court held that Mrs. Davis was not "otherwise qualified," and concluded that the College had not violated either Section 504 or 42 U.S.C. § 1983 in refusing to admit Mrs. Davis to its nursing program. (Pet. App. 20a).

On appeal, the Fourth Circuit held unanimously that the district court had erred in its reading of Section 504, particularly in light of the HEW Regulation to Section 504, issued after the district court decision. The Fourth Circuit ordered the district court to reconsider Mrs. Davis' application for admission to the College nursing program without regard to her hearing disability. (Pet. App. 5a). The court noted that "the college may consider such other relevant subjective and objective factors . . . utilized in the consideration of other candidates for enrollment in the nursing program." (Pet. App. 5a). While College nursing personnel had admitted that Mrs. Davis was academically qualified, the appeals court expressed no further opinion concerning Mrs. Davis' scholastic suitability. (Pet. App. 5a).

The court of appeals thus concluded that the district court erred by considering the nature of Mrs. Davis' hearing disability in determining whether she was otherwise qualified for admittance to the nursing program, instead of focusing upon her academic and technical qualifications as required by the HEW Regulation. (Pet. App. 6a). In light of the position of the College that it was not prepared to modify its nursing program to accommodate Mrs. Davis' hearing disability, the appellate court directed the district court, on remand, to give close attention to the HEW Regulation requiring the College to modify its program to accommodate Mrs. Davis' disability. (Pet. App. 9a).

The Fourth Circuit also affirmed the implicit ruling of the district court that a private right of action exists under Section 504. (Pet. App. 3a). However, in a footnote, the appeals court suggested that the district court also consider the issue of administrative exhaustion and primary jurisdiction, matters which had not been raised in either the district court or in argument before the court of appeals. (Pet. App. 11a).

The College petition for rehearing was soundly rejected, with only two judges voting to affirm the judgment of the district court.

SUMMARY OF ARGUMENT

I

Mrs. Frances Davis, a Licensed Practical Nurse with a hearing-impairment, wanted to enroll in a nursing school program at Southeastern Community College to become a Registered Nurse. Mrs. Davis sought to reach her full potential through advanced education, but the College refused her that opportunity solely on the basis of her hearing-impairment, without ever considering any possible accommodation for her disability. The College, on the basis of misconceptions and stereotypes, set up an absolute bar against any hearing-impaired person being admitted to nursing school. The district court's approval of the College's action foreclosed educational advancement for Mrs. Davis, in direct conflict with the purpose of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to help handicapped people reach their full potential. The court of appeals found that the district court erred in supporting the College's rejection of Mrs. Davis

solely on the basis of her handicap. The court of appeals' reversal was consistent with the statutory language and legislative intent of Section 504 as well as the subsequently enacted Regulation by the Department of Health, Education and Welfare (HEW).

The College's erroneous assumption that a hearing-impaired person cannot safely and effectively complete the educational requirements to become a registered nurse is contradicted by the very existence of many hearing-impaired persons safely and effectively performing in society every day as nurses, dentists and doctors. The College refused to recognize the possibility that Mrs. Davis could safely and effectively participate in its program, as other hearing-impaired persons have done elsewhere. The College insisted that Frances Davis—a woman whose hearing "approaches normal hearing levels," an experienced LPN with the highest recommendation from her employer—was not qualified solely because of her disability. The College's decision was dominated by the "archaic attitudes" that Section 504 and its Regulation sought to overcome.

The court of appeals properly gave deference to the statutorily delegated, carefully developed administrative interpretation of Section 504 in the HEW Regulation. The major thrust of the Regulation is to evaluate handicapped applicants on the basis of their qualifications. Only then can they receive an equal opportunity to participate in federally funded programs without being screened out at the admission stage.

This does not mean that schools must ignore a student's handicap. The Regulation allows colleges to evaluate a qualified student's handicap for purposes of determining what academic adjustments, if any, can be

made to enable the student to participate in the program. Academic adjustments, required by the Regulation, are essential to ensure that handicapped students receive equally effective treatment.

The College, however, was unwilling to make any academic adjustments for Mrs. Davis. Indeed no evidence was ever taken on the issue. Evidence on whether any accommodations were made for Mrs. Davis during her academic and clinical training as an LPN, and evidence on her employment experience at Southeastern General Hospital would help assess possible adjustments in the College's nursing program. Advances in medical technology have enabled many hearing-impaired RNs and doctors to function safely and effectively through the use of auxiliary aids.

Without such evidence, the district court rubberstamped the conclusory assertions regarding the inability of Mrs. Davis to safely and effectively perform in the clinical program. The appeals court properly remanded, suggesting that the district court consider the issue to academic adjustments which enable handicapped people to achieve their full potential. The court of appeals correctly followed the well established approach, approved by this Court, of remanding to the district court for reconsideration of Mrs. Davis' application for admission in light of the Regulation that postdates the district court decision.

II

Case law, legislative history and the statutory scheme of Section 504 confirm that under the four standards set forth by this Court in *Cort* v. *Ash,* 422 U.S. 66 (1975), Frances Davis can maintain a private cause of

action to enforce her statutory rights under Section 504.

First, Section 504 was enacted to prevent discrimination against all handicapped individuals. Frances Davis, a hearing-impaired woman, is thus obviously "one of the class for whose *especial* benefit the statute was enacted." *Cort,* 422 U.S. at 78.

Second, there is an abundance of legislative history indicating Congressional intent to create a private right of action. The 1978 Amendments confirm the Congressional intent expressed as far back as 1974, that "Section 504 . . . permit[s] a judicial remedy through a private action." S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390.

Third, enforcement through private litigation is consistent with and promotes the legislative purpose of the statute. In view of the large number of federally funded programs covered by Section 504, "the Act's laudable goals would be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the [federal government]." *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 556. Indeed, HEW itself firmly supports a private right of action for that very reason. Private suits are especially necessary because of the limited scope of administrative relief under Section 504. If the only remedy available were fund termination, then Congress' anti-discrimination mandate would be an "empty promise" for the very persons Congress intended to protect. Cf. *Allen,* 393 U.S. at 557. Private suits not only provide an avenue for vindication of personal rights under Section 504, but also complement the administrative fund

termination procedure by serving as an additional deterrent to violations.

Finally, the prohibition against handicap discrimination in federally funded programs is a uniquely federal concern, not traditionally relegated to state law. Thus, as recognized by every circuit court that has considered the issue, a private right of action to enforce Section 504 must be implied under the standards established in *Cort* v. *Ash*.

Petitioner erroneously contends that the Court must consider the issues of exhaustion of administrative remedies and primary jurisdiction if a private right of action is found. Neither issue was presented in the courts below. The Fourth Circuit thus properly remanded to the district court for consideration of these issues, if it deemed advisable.

Assuming *arguendo* that the exhaustion issue is properly before this Court, that doctrine should not prevent Frances Davis from bringing an independent private cause of action, because the HEW administrative remedy is inadequate and ineffective. HEW's administrative procedures are not designed to vindicate the personal rights protected by Section 504. "In short, while the administrative process may effectively provide, by way of the threat of fund termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a Section 504 violation." *Whitaker* v. *Bd. of Higher Education of City of NY*, 77-C-2258, slip op. at 19-20 (E.D. N.Y. Oct. 17, 1978).

The doctrine of primary jurisdiction also does not apply to the present case because of the same administrative inadequacies that excuse exhaustion. Moreover, courts are highly experienced and well-suited to the tasks of adjudicating discrimination complaints and interpreting the Section 504 Regulation. Thus, there is no need to allow HEW to take primary jurisdiction in this case.

ARGUMENT

Introduction

Mrs. Frances Davis, a Licensed Practical Nurse with a hearing impairment, wanted to enroll in a nursing school program at Southeastern Community College to become a Registered Nurse. Mrs. Davis sought to reach her full potential through advanced education. But the College refused her that opportunity solely on the basis of her hearing impairment, without ever considering any possible accommodation for her disability. The College, on the basis of false stereotypes, created an absolute bar against any hearing-impaired person being admitted to nursing school. The College assumed that Mrs. Davis could not do all aspects of a clinical program, yet refused to consider possible adjustments to that program for Mrs. Davis. Obsessed with the notion that hearing loss is an absolute obstacle to admission, the College ignored the fact that Mrs. Davis was academically qualified (Pet. App. 77a) and had been a duly qualified LPN since 1967. The College ignored the fact that, in becoming an LPN, Mrs. Davis successfully completed the clinical aspects of her training. As an LPN, she worked at Southeastern General Hospital and in private nursing. Her present employer, the Director of Nursing Services at Southeastern General Hospital, stated that, "I do not believe that I can truthfully state that she would not be able to func-

tion in any area of nursing with her present determination to continue her education." (Pet. App. 141a). The College also ignored the fact that a new hearing aid provided Mrs. Davis "with a significant improvement in her hearing which approaches normal hearing levels." (Pet. App. 127a).

The College's rejection of Mrs. Davis solely on the basis of her hearing loss was endorsed by the district court, which found her unqualified without ever considering possible accommodations for her disability.

The district court's approval of the College's action foreclosed educational advancement for Mrs. Davis in direct conflict with the purpose of the Rehabilitation Act of 1973 and Section 504, "to assist handicapped individuals in achieving their full potential." [1] The court of appeals found the district court erred in supporting the College's rejection of Mrs. Davis solely on the basis of her handicap. The court of appeals' reversal was consistent with the statutory language and legislative intent of Section 504, as well as the subsequently enacted HEW Regulation.

I. The Court of Appeals Held Correctly, Consistent with Section 504 and the HEW Regulation to Implement That Section, That the District Court Erred in Solely Focusing on Respondent's Handicap to Determine Whether She Was Qualified for Admission.

A. The Court of Appeals properly remanded in light of the HEW Regulation that posidates the district court opinion.

The district court did not have the benefit of the HEW Regulation when it rendered its opinion. The

[1] Remarks of Senator Robert Dole, 119 Cong. Rec. 24589-90 (1973).

Fourth Circuit merely applied the law in effect at the time of its decision, *Thorpe* v. *Housing Authority,* 393 U.S. 268 (1969), giving due weight to the interpretation of Section 504 by the agency charged with its administration. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); *Udall* v. *Tallman,* 380 U.S. 1 (1965). The only result of the Fourth Circuit's decision is the remanding to the district court for reconsideration of Mrs. Davis' application for admission in light of the Regulation implementing Section 504 that postdates the district court decision. This remand is totally consistent with the action of other circuits in Section 504 cases. See *United Handicapped Federation* v. *Andre,* 558 F.2d 413 (8th Cir. 1977); *Lloyd* v. *Regional Transportation Authority,* 548 F.2d 1277, 1287-8 (7th Cir. 1977). This Court has followed a similar procedure of remanding to reconsider new regulations adopted after a decision in the lower courts. See *Youakim* v. *Miller,* 425 U.S. 231 (1975); *Richardron* v. *Wright,* 405 U.S. 208 (1972); *Thorpe* v. *Housing Authority,* 386 U.S. 670 (1967).

The court of appeals made clear the limited scope of its opinion when it stated, "We do not, at this time, absent a more fully developed record below, wish to expand further upon the regulations, their reasonableness, or their scope." (Pet. App. 8a, n.7a).

The court of appeals reached a narrow decision based on statutory grounds rather than constitutional claims. This established approach has been recently reaffirmed by this Court in *New York City Transit Authority* v. *Beazer,* No. 77-1427 (decided March 21, 1979).

B. The statutory language of Section 504 and its legislative history support the Court of Appeals decision.

Section 504 of the Rehabilitation Act of 1973 provides that, "[n]o otherwise qualified handicapped individual . . . shall, *solely by reason of his handicap,* be excluded from the participation in . . . any program or activity receiving federal financial assistance." 29 U.S.C. § 794, as amended. (emphasis added). In order to enforce that express statutory right, the Fourth Circuit was compelled to strike down the College's rejection of Mrs. Davis solely on the basis of her disability.

Just as earlier statutes sought to erase discrimination against women and minorities,[2] Section 504 was enacted to halt a long history of discrimination against disabled persons. See Hearings on H.R. 8395 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare. 92d Cong., 2d Sess. (1972).[3]

[2] Congress has repeatedly recognized the parallels between Section 504 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et seq.* In fact, Section 505 of the 1978 Amendments to the Rehabilitation Act expressly extends the rights available under Title VI to persons protected under Section 504. See discussion *infra.*

[3] See Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause, 15 Santa Clara Lawyer 855 (1975). Another author has concluded that "the effects of earlier misconceptions and ignorance continue to shadow a handicapped person's successful assimilation into society." See, "Civil Rights—Handicapped Discrimination—Private College Required to Provide Interpreter Services for Deaf Student under Section 504 of the Rehabilitation Act of 1973." 8 Cumberland L.Rev. 977, 979 (1978). The author concludes: "the enactment of legislation will not be the end of the struggle for handicapped citizens. Historically, the handicapped have been systematically subjected to purposeful, unequal treatment of considerable scope, degree, and duration. Hopefully, the new legislation and the cases construing it will focus a light on the needs of the handicapped and erase the stigma society has attached to this group. This will be the beginning of a process which must ensure that the handicapped are afforded equal opportunity based on their abilities and are not discriminated against because of their disabilities." at 989.

Congress proclaimed that the "final objective" of the Rehabilitation Act was the "complete integration of all individuals with handicaps into normal community living, working and service patterns."[4] White House Conference on Handicapped Individuals Act of 1974, P.L. 93-516, 88 Stat. 1631, 29 U.S.C. 701 note.

Congress recognized that elimination of the obstacles to education and employment is a critical aspect of securing complete integration of all handicapped persons. Accordingly, the Rehabilitation Act seeks to "initiate and expand services to groups of handicapped individuals . . . who have been underserved in the past," 29 U.S.C. 701(6), and, more importantly, to "promote and expand employment opportunities in the public and

[4] The expansive statutory definition of the class of handicapped persons protected by Section 504 further indicates Congressional intent to achieve the complete integration of all handicapped persons. Section 7(6) of the Act defines "handicapped individual" as any person who:

(a) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;
(b) Has a record of such impairment; or
(c) Is regarded as having such an impairment. 29 U.S.C. 706.

This expansive definition was added by Congress in the 1974 Amendments to the Act in direct response to the broad dictates of Section 504. See SEN.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373. Mrs. Davis clearly falls within that statutory definition. See discussion *infra.*

private sectors for handicapped individuals and to place such individuals in employment." 29 U.S.C. 701 (8).

Congress was especially concerned about advancing educational opportunities for handicapped people. The Senate Labor and Public Welfare Committee states in its Report:

> Special attention must be paid to the needs of those individuals who through no fault of their own have *not* received adequate education. These individuals, young adults and adults alike, must be afforded *equal opportunity and access to higher educational services.* The Committee is aware that at the present time *most of these avenues are not open to individuals with handicaps* . . . .

S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6408 (emphasis added).

The district court, by allowing the College to deny Mrs. Davis the education she needs to advance to her fullest potential in her profession, has violated that express statutory intent.[5]

When it passed Section 504, Congress recognized that false assumptions and stereotyped notions concerning the inability of disabled persons to participate fully and contribute meaningfully to society had "all too often resulted in the violation of their basic rights as human beings, and had condemned them to lead useless lives." *Id.* at 6400. By imposing a duty not to discriminate on recipients of federal financial assistance, Congress intended to remove these "archaic attitudes" and require recipients to focus on the capabilities of disabled persons. *Id.* at 6400. See also Remarks of Senator Packwood, 119 Cong. Rec. 29633 (1973) and Senator Taft, 119 Cong. Rec. 24587 (1973). Accordingly, "the rationale of Section 504 is that a disability is irrelevant to an individual's potential to contribute to, or benefit from, those activities that the federal government assists." Cook, "Nondiscrimination in Employment Under the Rehabilitation Act of 1973," 27 Am. U.L. Rev. 31, 42 (1977).

In enacting Section 504, Congress sought to prohibit exclusion of handicapped persons from educational programs because of stereotyped assumptions about their inability to participate in such programs. The College's rejection of Mrs. Davis stems from a lack of knowledge about the abilities of handicapped individuals and unwarranted fears of their unsafe performance. Because of the general population's limited experience in living and working with handicapped persons, such prejudices and fears based upon such ignorance have persisted. The College's erroneous assumption that a hearing-impaired person cannot safely and effectively complete the educational requirements to become a registered nurse is contradicted by the very existence of many hearing-impaired persons safely and effectively performing in society every day as nurses, dentists and doctors and as students in nursing, dental and medical schools across the country. The U.S. Civil Service Commission found in its Report on "Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government," (April 30, 1978), that of the federal employees responding to the

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[5] Senator William Jennings Randolph, Chairman of the Subcommittee on the Handicapped, stated that Section 504 was intended to "expand the vistas of opportunity for handicapped individuals." 119 Cong. Rec. 24587 (1973). See also remarks of Senator Dole, n.1, *supra.*

study, there are 156 hearing-impaired nurses now working with the federal government. (See Respondent's Appendix A). The Amicus Briefs of the American Academy for the Advancement of Science and the Legal Aid Society of New York point out numerous other examples of successful practicing hearing-impaired registered nurses, dentists and doctors providing safe and effective care to their patients.

Among the examples given by the Amicus American Academy for the Advancement of Science and the Legal Aid Society of New York are severely hearing-impaired registered nurses who successfully completed registered nursing programs. Erica Herzig is an RN, with a profound hearing loss, who graduated from the Columbia University School of Nursing. She is now safely practicing as an RN providing total patient care in a New York City Hospital. Ann Keenan Ogden is an RN, with a severe hearing loss since age three, who graduated from St. Anthony's School of Nursing in Rockford, Illinois, and she is now working in a hospital in California in advanced care and rehabilitation. Keith Ellen Ragsdale is an RN, with a severe hearing loss since age four, who graduated from Del Mar College in Texas. She has been Acting Assistant Dean of the University of North Dakota College of Nursing. Ms. Ragsdale was a staff nurse in various hospitals in the intensive care—coronary care unit and emergency room.

There are also deaf doctors safely and effectively working with patients. Dr. Frank Hochman's congenital deafness did not prevent him from graduating from Rutgers Medical School. He now has a pediatric practice at San Jose Hospital which includes a patient population that is fifty percent hearing impaired.

The fact that there are such hearing-impaired professionals amply demonstrates the invalidity of the College's position. Ignorant of this reality, the College refused to recognize the possibility that Mrs. Davis could safely and effectively participate in its program, as other hearing-impaired persons have done elsewhere.[6]

Instead, the College allowed its admission process to be dominated by considerations and conclusions based on erroneous stereotypes rather than on Mrs. Davis' abilities. Early in the admissions process, the College focused on Mrs. Davis' disability ignoring her admitted academic qualifications and experience as an LPN. The College failed to consider that Mrs. Davis had been medically certified as mentally and physically able to undertake the nursing school program (App. 120a).

The College ignored the fact that Mrs. Davis had successfully completed the clinical training to become an LPN, and was judged by her employer, as ". . . able to function in any area of nursing with her present determination to continue her education." (App. 177). Instead, the College rejected Mrs. Davis' application, in part, because of "their *feelings* that she would be unable to serve as a Registered Nurse on completion of such a program." (Pet. App. 16a) (emphasis added).[7]

[6] The College refused to even consider ways to modify its program so that Mrs. Davis could safely and effectively participate. (App. 86a). Yet Congress recognized that in many instances, auxiliary aids and program modifications alleviate any safety fears and enable the disabled person to maximize her talents. See discussion *infra*.

[7] The College ignored her employer's further statement that "I would employ Mrs. Davis in our skilled nursing facility if I had a vacancy. . . ." (Pet. App. 179).

The College consistently chose to ignore reality and focused instead upon speculative fears based on false assumptions. The College insisted that Frances Davis, a woman whose hearing "approaches normal levels" (Pet. App. 127a), and experienced LPN with the highest recommendations from her employer, was not qualified solely because of her disability. A pattern emerges of a college admissions decision influenced by stereotyped notions concerning the applicant's disability. It was a decision dominated by the "archaic attitudes" that Congress sought to overcome with the enactment of Section 504. The district court upheld the College's decision. The court of appeals, however, recognized Congress precluded this sole focus on disability in its efforts to achieve the complete integration of all handicapped persons.

C. The properly authorized HEW Regulation implements Congressional intent

The Fourth Circuit properly gave great weight to HEW's Section 504 Regulation.[8] The Regulation was

[8] Congress clearly intended for the Regulation to be promulgated under Section 504, as the Senate Committee Report on the 1974 Amendments to the Act explains:

> [Section 504] does not specifically require the issuance of regulations or expressly provide for enforcement procedures but it is clearly mandatory in form and such regulations and enforcement are intended. S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6440.

Congress further intended that those regulations were to be swiftly implemented by the close of 1974. *Id.* at 6391.

Not only was the Regulation authorized by Congress and issued pursuant to Executive Order No. 11914, 3 C.F.R. § 117 (1976), but it was also ordered by a federal district court in Cherry v. Mathews, 419 F.Supp 922 (D.D.C. 1976). The Court found, on the basis of the House and Senate Reports on the 1974 Amendments, that Congress intended swift implementation of Section 504 through a comprehensive set of regulations. Stating that "the statute's discrimination prohibitions were certainly not intended to be self-executing," the court ordered the Secretary of HEW to promulgate the Regulation without further delay. 419 F.Supp. at 924. See also Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1238 (7th Cir. 1977).

Section 505(a)(1) of the 1978 Amendments to the Rehabilitation Act expressly codifies the statutory delegation of authority for promulgation of regulations by making the rights, remedies and procedures available under Title VI equally applicable to Section 504. Title VI contains an express statutory delegation of authority for promulgation of regulations. 42 U.S.C. 2000(d). See also S. Rep. No. 820, 95th Cong., 2d Sess. 19 (1978).

carefully developed after an exhaustive and comprehensive rulemaking process involving public comment from recipients, state and local governmental units, and affected organizations.[9] Thus, when that extensive regulatory effort to effectuate Congressional intent was completed on April 28, 1977, Secretary Califano declared:

> In sum, the regulation issued today reflects my best judgment of how Congress intended that the broad

[9] Over three hundred written comments were received in response to HEW's Notice of Intent to Issue Proposed Rules. The written comments were supplemented by a series of ten meetings conducted by the Office for Civil Rights at various locations across the country. On *July 16, 1976,* the Department published a Notice of Proposed Rulemaking, analyzing the public comments received on the critical proposed regulation for further public comment. A total of more than 850 comments were received and analyzed. An additional twenty-two public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulations and to solicit their comments and recommendations. Transcripts of all these meetings were made, and analyzed along with the written comments.

uncompromising statutory command of Section 504 should be translated into specific rules that vindicate the rights of handicapped citizens and that deal firmly, yet sensibly, with those recipients of Federal funds who will be subjected to significant new requirements.[10]

On numerous occasions this Court has determined that administrative interpretation of a statute by the enforcing agency is entitled to "great deference." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The Fourth Circuit gave that "great deference" to the statutorily delegated, carefully developed, HEW Regulation which effectuates Congressional intent that colleges and other programs which receive federal funds shall not exclude disabled persons "solely on the basis of their handicap." 29 U.S.C. § 794.

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[10] In signing the 504 Regulation, Secretary Califano further noted that Section 504 was enacted because "for decades, handicapped Americans have been oppressed and, all too often, a hidden minority subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens."

The Regulation was intended to "open a new world of equal opportunity for the more than 35 million handicapped Americans. The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress despite their disabilities. It will usher a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law." See Statement of Joseph A. Califano, Secretary, Department of Health, Education and Welfare, April 29, 1977.

D. The HEW Regulation also supports the Court of Appeals' decision

The HEW Regulation establishes a carefully designed regulatory scheme effectuating congressional intent to ensure a nondiscriminatory admissions process in postsecondary educational programs. The major thrust of the Regulation is to evaluate handicapped applicants on the basis of their qualifications, not their disabilities. Only then can the handicapped applicants receive an equal opportunity to participate in federally funded programs without being screened out at the admissions stage.

The Regulation, however, does not preclude consideration of an applicant's handicap. The Regulation allows colleges to evaluate a qualified student's handicap for purposes of determining what academic adjustments, if any, can be made to enable the student to participate in the program. 45 C.F.R. §§ 84.42(b)(4) and 84.44. Academic adjustments are essential to ensure that handicapped students receive equally effective treatment. See discussion *infra*. At the admissions stage, however, undue focus on an applicant's handicap often results in the rejection of qualified handicapped persons because of their disabilities. This is precisely what happened to Mrs. Davis.

The College's major error, as the Fourth Circuit recognized, was this sole focus on Mrs. Davis' hearing impairment rather than on her "academic and technical" qualifications, as required by 45 C.F.R. § 84.3(k)(3) of the Regulation. That section defines a "qualified handicapped person" for purposes of postsecondary education as one who "meets the academic and technical standards requisite to admission . . . ."

This definition works together with the ban on pre-admission inquiries into an applicant's handicap, 45 C.F.R. § 84.42(b)(4),[11] and the ban on future employability inquiries, 45 C.F.R. § 84.43(c), to require colleges to focus on an applicant's qualifications, not his or her physical handicap.

According to the College, the "technical standards" referred to in 45 C.F.R. § 84.3(k)(3) include physical qualifications.

Technical standards are defined in the analysis to the Regulation as "all nonacademic admissions criteria that are essential to participation in the program in question." 42 Fed. Reg. 22687 (1977). "Technical standards" include such factors as work experience, degree prerequisites or residency requirements.

To permit consideration of handicap as a technical standard would circumvent the ban on preadmission inquiry (45 C.F.R. § 84.42(b)(4)) and its underlying § 504 statutory policy that schools must impartially look at an individual's abilities without the distorting influence of "archaic attitudes."[12] Allowing physical

[11] The purpose of the ban on preadmission inquiries is to prevent schools from considering handicap at the admission stage since stereotyped misconceptions and prejudices usually take over to screen out qualified persons as soon as their handicaps are known. The ban reduces the potential for such discrimination, especially with respect to persons with non-visible handicaps. To prevent this dangerous distortion of admission decision-making, the Regulation delays any inquiry into an applicant's handicap until after the applicant has been found academically and technically qualified. After that, the College can consider a person's handicap for the purpose of making modifications in its program.

[12] The American Council on Education and the American Association of Collegiate Registrars and Admissions Officers support the ban on pre-admission inquiry. See *The American Association of Collegiate Registrars and Admissions Officers and The American Council on Education, Recruitment, Admissions, and Handicapped Students: A Guide for Compliance With Section 504 of the Rehabilitation Act of 1973 April, 1978.*

handicap to be considered through the back door as a technical qualification could exclude all handicapped applicants. For example, since legal materials are printed and not usually found in Braille, law schools could argue that sight is a "technical" requirement and on that basis, exclude all blind applicants.

If hearing could be considered a "technical" requirement, an applicant could be excluded at the outset of the admissions process, regardless of whether or not some academic adjustment could be made that would enable a student to effectively participate in a program. This is clearly what HEW intended to avoid by requiring academic adjustments. See 45 C.F.R. § 84.44 and discussion *infra*.

The College contends that because Mrs. Davis is hearing-impaired, she cannot perform the essential functions of the clinical program. In so doing, the College adopts in part the employment definition of qualified handicapped person, i.e., a handicapped person who, "can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1). Yet the district court has not made a finding of fact that any part of the clinical program is essential. Furthermore, the College omits the second part of the employment definition, that is, whether the employee can perform the essential functions of the job, "with reasonable accommodation." The Fourth Circuit found that the College would not modify its nursing program.

Finally, and most importantly, it must be remembered that this is not an employment case, but a post-

secondary education case. The College errs in equating an applicant for college nursing program with an applicant for a particular job. The HEW Regulation makes no such error.

The Regulation for both policy and practical reasons refuses to equate the two. Instead, because of the diversity of types of handicaps, as well as the wide variety of settings in which programs financed by HEW are offered, 42 Fed. Reg. 22676 (1977), HEW recognized the need to define, "qualified handicapped person," in four ways, depending upon the type of federally assisted program at issue—(1) employment, 45 C.F.R. § 84.3(k)(1); (2) preschool, secondary, and adult education, 45 C.F.R. § 84.3(k)(2); (3) postsecondary education, 45 C.F.R. § 84.3(k)(3) and (4) program accessibility and health, education, welfare, and social service, 45 C.F.R. § 84.3(k)(4).[13]

The Congressional purpose of ensuring equal opportunity and full participation in society for all handicapped individuals could not have been realized had HEW defined "qualified handicapped person" in only one way.[14] It would be contrary to the regulatory pur-

[13] The HEW Regulation uses the term "qualified handicapped person" and "otherwise qualified handicapped person" synonymously under its Regulation. 42 Fed. Reg. 22686 (1977).

[14] The same definition of "qualified handicapped person" for all different programs and activities funded by HEW would not make any practical sense. A handicapped person who "meets the essential eligibility requirements" and is thus "qualified" to receive food stamps may not be "qualified" to "perform the essential functions" of a particular job. Conversely, a handicapped person, who is "qualified" and actually receiving a salary for a particular job, would not meet the essential eligibility requirements to be "qualified" to receive food stamps.

pose and legislative intent to define "qualified handicapped person" in the same way for postsecondary education as for employment. A handicapped person may not be qualified for a particular job until after that person has attained certain education skills.[15] While an employer has a valid interest in hiring qualified persons, exclusion of handicapped applicants from admission to colleges and universities impedes rather than promotes this interest. By defining "qualified handicapped person" differently in the context of postsecondary education and employment, HEW sought to avoid this cause and effect relationship in which discrimination in education perpetuates the unemployment and under-employment of handicapped persons. S.Rep.No. 1139, 93d Cong. 2d Sess. 32 (1974).

The purpose of clinical training, unlike actual employment, is to provide a controlled supervised setting for learning practical skills. That is why HEW included vocational training within the scope of postsecondary education, rather than employment.

A college may not refuse to admit a handicapped person simply because employment opportunities in any occupation may be more limited.[16] At the time of

[15] For example, there are obviously different qualifications required for a law school applicant than for a person applying for a position as a lawyer. Indeed a law school degree is one prerequisite to obtaining employment as a lawyer. A law school would not condition its acceptance of an applicant on the applicant's assurance of future employment because no law firm would provide the applicant with that assurance prior to entering law school.

[16] 45 C.F.R. §§ 84.10(b) and 84.43(c). The HEW Analysis to 45 C.F.R. § 84.43(c) explains that "this paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and areas of concentration because of . . . assump-

Mrs. Davis' application, regardless of her ability to do the educational work, the college was unwilling to certify that she could practice and be licensed as an RN because of her hearing limitations. (Pet. App. 48A). No professional school, such as a law school, can predict, before a student enters a program, that a student will pass the licensing tests, such as a state bar, or will get a job after graduation.

Indeed, the Director of the State Board of Nursing indicated that it could not predict Mrs. Davis' eligibility for licensing at some time in the future (Pet. App. 139A). The Fourth Circuit properly noted that "we do not have before us the question of "limited" versus "unlimited" certification of the plaintiff as an RN. If the plaintiff meets all the other criteria for admission in the pursuit of her RN career, under the relevant North Carolina statutes, N.C.Gen.Stat. §§ 90-158, *et seq.*, it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." [Pet. App. 6a]. Clearly, the purpose of Section 504 and the HEW Regulation is to ensure that persons applying for post-secondary education programs are judged on their qualifications to enter *that particular program,* and not on the basis of speculation about their prospects once the program is successfully completed.

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tions by the recipient that no job would be available in the area in question for a person with that handicap." 42 Fed. Reg. 22692 (1977). See also 45 C.F.R. 84.10(a) which states that a college may not refuse to admit a handicapped person simply because State law would impose "prohibitions or limits upon the eligibility of handicapped persons . . . to practice any occupation or profession."

II. The Court of Appeals Was Correct in Suggesting That the District Court Give Close Attention on Remand to Affirmative Relief in Light of the District Court's Failure to Consider any Accommodation for Respondent's Handicap.

As essential and undisputed fact in this case is that the College refused to modify its nursing program to accommodate Mrs. Davis' hearing-impairment. The College was unwilling to make any curriculum modifications to aid any handicapped person in pursuing a career in nursing. (App. 86a).

The College asserts that Section 504 does not authorize any kind of "affirmative relief." But this issue is not properly before this Court.[17] As noted by the Fourth Circuit, the issue of affirmative relief was not raised before the district court, but was advanced for the first time before the circuit court. It was thus entirely proper and fair for the circuit court to identify the issue of "affirmative relief" and suggest that, on remand, the district court give close attention to academic adjustments required by the HEW Regulation issued after the district court decision.

In remanding, the Fourth Circuit thus responded to the College's refusal to modify its nursing program, noting the contradiction between the college position and the HEW Section 504 Regulation.

The Fourth Circuit then concluded that case law, in addition to the Section 504 Regulation, "likewise sup-

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[17] This Court has consistently refused to consider issues which had not been pleaded, proved or briefed either in federal district court or the circuit courts. Since Mirce v. Dekalb County, Ga., 433 U.S. 25 (1977); Stone v. Powell, 428 U.S. 465 (1976), *rehearing denied,* 429 U.S. 874 (1976); U.S. v. Estate of Donnelly, 397 U.S. 286 (1970).

ports the requirements of affirmative conduct on the part of certain entities under Section 504 . . . ." (Pet. App. 9a).

Assuming *arguendo* that the issue is properly before this Court, the College errs in asserting that Section 504 does not authorize any kind of affirmative relief. Congressional and judicial action make clear that Section 504 does in fact require affirmative relief to ensure equal access by handicapped persons to federally assisted education and employment programs.

The Senate Report, accompanying the 1974 Amendments to the Rehabilitation Act, expressly states that: "Where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition of discrimination." S.REP.NO. 1297, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6390.[18]

Legislative intent in support of affirmative conduct under Section 504 was further demonstrated in congressional oversight hearings in 1977 [19] and in the enact-

[18] Courts have long adhered to the principle that subsequently enacted legislation declaring the intent of an earlier statute is entitled to great weight in statutory construteion. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969); FHA v. Darlington, 358 U.S. 84 (1958); Glidden v. Zdanok, 370 U.S. 530 (1962).

[19] Members of the House Subcommittee on Select Education of the Committee on Labor and Education, directed questions to David Tatel, Director of HEW's Office for Civil Rights, regarding modifications in educational opportunities for handicapped students, building accessibility requirements, and interpreters for deaf college students. Thus, Congress was clearly aware of the affirmative obligations required by HEW's Selection of 504 Regulation. See Hearings on Implementation of Section 504 of the Rehabilitation Act of 1973 before Subcommittee on Select Education of the House

ment of the 1978 Rehabilitation Act Amendments. At the time of both the 1977 hearings and the 1978 Amendments, Congress was clearly aware of the affirmative obligations required by the HEW Regulation to Section 504. Yet nothing in the 1978 Amendments overrules the Regulation. Congressional reenactment without revising the affirmative obligations imposed by the HEW regulation confirms that these affirmative obligations were in fact intended by Congress.[20]

Courts have similarly found that affirmative obligations are imposed by Section 504. In *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977), the Seventh Circuit held that Section 504 imposes affirmative duties upon transportation officials to adapt mass transit vehicles and services to accommodate mobility impaired persons.

> There is no equality of treatment merely by providing the handicapped with the same facilities as ambulatory persons . . . ; for handicapped persons who cannot gain access to such facilities are effectively foreclosed from any meaningful public transportation.

548 F.2d at 1284.

Committee on Education and Labor, 95th Cong., 1st Sess., pp. 359-366 (1977) [hereinafter referred to as 1977 House Oversight Hearings].

[20] Congressional failure to revise or repeal an agency interpretation has long been recognized as indicative of Congressional acquiescence in the agency interpretation. Zemel v. Rusk, 381 U.S. 1, 11-12 (1965); Costanzo v. Tillinghast, 287 U.S. 341 (1932); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 313 (1933); Commissioner of Internal Revenue v. Estate of Noel, 380 U.S. 678, 682 (1965); N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 365-366 (1951).

This reasoning was adhered to in *United Handicapped Federation* v. *Andre,* 558 F.2d 413 (8th Cir. 1977) in which the Eighth Circuit found that Section 504 creates affirmative duty on the part of mass transit recipient who were required to conform to the regulation and guidelines. "It is difficult to assess the record and the statute in any other light." 558 F.2d at 416. Four circuit courts have found that affirmative obligations are imposed by Section 504. None have held to the contrary. *Davis* v. *Southeastern Community College,* 574 F.2d 1158 (1978), *cert. granted.* Jan. 8, 1979; *Doe* v. *Colautti,* #78-1828 (3rd Cir. Feb. 8, 1979).

The College further argues that even if Section 504 requires affirmative relief, no such relief is available to Mrs. Davis in this case. This argument was not raised before the district court, nor the circuit court, but is advanced by the College for the first time in this Court. This is yet another issue not properly before the Court. The district court made no determination on any academic adjustment for Mrs. Davis and the Fourth Circuit properly remanded for the taking of evidence on this issue.

The College is left in the untenable position of arguing that there are no academic adjustments for Mrs. Davis. Yet the College refused to make any modifications to its nursing program. The very purpose of academic adjustments is to enable qualified handicapped students to overcome their physical disabilities so that they can effectively participate in the post-secondary education program.

The Regulation precludes consideration of handicap at the admissions stage to avoid the stereotyped misconceptions and prejudices which have been found to

screen out qualified applicants once their handicaps are known. This is exactly what happened to Mrs. Davis. Discussion *supra.* But once the handicapped person has been found "otherwise qualified," her disability becomes relevant to a determination of academic adjustments. At this stage, inquiry into handicap enables the college to make an informed decision of what adjustments, if any, can be made to allow the disabled student to participate in the program and to achieve her full potential. But as the Fourth Circuit explained, the College "... was not prepared, from a faculty viewpoint, to adequately supervise and train the plaintiff during her clinical training. Therefore, it could not modify its program to compensate for plaintiff's hearing disability." (Pet. App. 9a). Yet, HEW recognized the need for academic adjustments. Often handicapped persons are not provided an equal opportunity merely by providing them with the same facilities, the same programs, and the same teachers provided to non-handicapped persons. Thus, the Regulation requires recipients to provide special services to ensure that handicapped persons receive "equally effective," benefits and treatment. The HEW Analysis explains, "the term 'equally effective' . . . is intended to encompass the concept of equivalent, as opposed to identical services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped are met, adjustments to regular programs or the provisions of different programs may sometimes be necessary." 42 Fed. Reg. 22687 (1977). "Identical treatment may in fact constitute discrimination." See remarks of former HEW Secretary Matthews, 41 Fed. Reg. 20296 (1976). As HEW Secretary Califano

pointed out in the comments preceding the Regulation to Section 504:

> . . . it is meaningless to "admit a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building, nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

42 Fed. Reg. 22676. (1977)

Accordingly, the HEW Regulation imposes specific academic adjustment obligations on colleges and universities.[21] Modifications include changes in the length of time permitted to complete degree requirements, substitution of specific courses, and adaptation of the manner in which courses are conducted. 45 C.F.R. § 84.44(a). The Regulation further requires colleges and universities to provide auxiliary learning aids, such as sign language interpreters for deaf students and

[21] Affirmative relief requirements are specified throughout the Regulation. See 45 C.F.R. § 84.6(a) (remedial action required of all recipients to overcome the effects of discrimination) 45 C.F.R. §§ 84.31-37 (duty of public elementary and secondary schools to provide free, appropriate public education to all handicapped children); 45 C.F.R. § 84.52(c) (hospitals' duty to establish procedure for effective communications with deaf patients in emergency health care situations); 45 C.F.R. § 84.52(d) (duty of health, welfare and social service agencies with 15 or more employees to provide appropriate auxiliary aids to persons with impaired sensory, manual or speaking skills) 45 C.F.R. §§ 84.21-23 (duty of all recipients to make their programs and facilities readily accessible to and usable by handicapped persons); 45 C.F.R. § 84.12 (employers' duty to make "reasonable accommodations" for the physical and mental limitations of qualified handicapped employees and applicants).

readers for blind students. 45 C.F.R. § 84.44(d).[22] Determinations concerning specific adjustments will depend on the facts of each particular case. But in this case, the district court made no determination on any academic adjustments. Accordingly, the Fourth Circuit remanded for the taking of evidence on this issue.

No testimony was taken nor did the College even consider what academic adjustments, if any, are necessary in this case. Evidence on whether any accommodations had been made for Mrs. Davis in her academic and clinical training as an LPN would help assess possible academic adjustments for the College's Nursing Program. It would also be helpful to take evidence on Mrs. Davis' past experience in private duty nursing and her current employment as an LPN at Southeastern General Hospital. The College never even discussed possible academic adjustments with Mrs. Davis. The HEW Regulation recognized that the handicapped individual is often in the best position to know which

[22] It is not appropriate to equate academic adjustments necessary to ensure equal opportunity in this case with the accommodations standards laid down in TWA v. Hardison, 432 U.S. 63 (1977), a case involving a discharge of a worker for refusing to report on Saturday for religious reasons. In addition to breaching a valid collective bargaining agreement, an accommodation in Hardison would have amounted to unequal treatment of employees because of their religious beliefs. The Hardison case, dealing with religious discrimination in employment, is easily distinguishable from this handicapped discrimination case. Post-secondary educational institutions have signed an Assurance of Compliance Form with HEW agreeing to follow the Regulation. Thus, failure to abide by "affirmative relief" sections of the Regulation would breach a valid contract between recipients and HEW. Second, academic adjustments, unlike accommodation for religious reasons, do not infringe on any rights of other students. In fact, in making such adjustment, it is indeed possible that all students will benefit.

accommodations are necessary. See 45 C.F.R. § 84.6(c) and its corresponding HEW Analysis, 42 Fed. Reg. 22687 (1977).

Advances in medical technology have enabled many hearing-impaired registered nurses and doctors to function safely and effectively through the use of aids, *e.g.*, an electronic amplifying stethescope to hear lung sounds, a sphygomoanometer to measure blood pressure, improved hearing aids, phone amplifiers, and teletypewriters. These hearing-impaired professionals, who have already demonstrated safe performance in the medical field would be a valuable resource on effective academic adjustments.[23]

[23] See also Redden, Martha R., Cheryl A. Davis, & Janet W. Brown, "Science for Handicapped Students in Higher Education," American Association for the Advancement of Science, AAAS Pub. 78-R-2, 1978. The authors identified barriers to postsecondary science education and methods for overcoming them. Special interest was given to disciplines requiring laboratory, clinical, or field work. The most limiting barriers and the hardest to combat were those defined as attitudinal. "After the professor changed his mind about my capabilities, all those course modifications were made easily." Consultation with a "role model" scientist was seen as one way to counteract stereotyping and to change attitudes about accommodation to a handicap. "It is difficult to look down, for example, on a deaf scientist like Dr. Myron Weinberger (Associate Professor of Medicine at Indiana University), who supervises a research team of more than thirty people or confront the deaf chemist, Dr. John Cornforth, who recently won the nobel prize." at 23. See also Brown, "Who are the Handicapped Scientists?" 190 *Science* 546 (11/7/75), in which the author reports ". . . successful handicapped scientists have required extraordinary, almost unbelievable, perseverence to achieve an education. . . ." "All of them can tell stories of the professor who, having no experience with the handicapped, routinely dismissed their abilities in the assumption that . . . they would not be able to keep up with the reading because they were blind, or would not be safe in the laboratory because a limb did not function. One deaf woman chemist was required to undergo an additional examination to get her Ph.D., after she had completed with honors all the requirements demanded of her normal colleagues. . . ." "Although the myth that handicapped workers present additional safety hazards has been disproven in practice, this concern is still widely used by employers to reject handicapped applicants." (Citing James H. Sears, "The Able Disabled," *Chemtech* (December 1974), pp. 713-15. [Many handicapped scientists] hope that changing attitudes will make it possible for all bright, able, scientifically-inclined youngsters to choose science without having to be super-achievers in order to reach their goals." 190 *Science* 546, at 546, 593.

The College's conclusion that Mrs. Davis would be unsafe simply cannot be made until after the college has carefully reviewed its nursing program in light of the academic adjustments section of the HEW Regulation.[24]

[24] The College's reliance on Hodgson v. Greyhound Lines, 499 F.2d 359 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1957); Usery v. Tamiami Tours, 531 F.2d 224 (5th Cir. 1976), both cited in Pet. Bf. at 46, is misplaced. First, the rationale of Greyhound and Tamiami has been seriously undermined by later cases, all of which have demanded strict proof of casual relationships between age and inability to safely perform job-related tasks, in a wide variety of jobs. See, e.g., Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.) (Clark, Cir. J.) *cert. denied*, 434 U.S. 966 (1977) (test pilots); Rodrigues v. Taylor, 428 F.Supp. 1118 (E.D. Pa. 1976) (police officers). Second, even if the Court were inclined to follow Greyhound and Tamiami, those cases are distinguishable, in that their respective trial courts received massive quantities of evidence indicating both mental and psychological charges inherent with aging precluded safe performance of particularized essential job tasks. Contrast the case before the Court, in which the College has failed to identify essential abilities necessary to participate safely in its educational program, failed to test Mrs. Davis' abilities to so participate, and failed to consider the impact of the provision of academic adjustments, or auxiliary aids, on those abilities as required by the HEW Regulation.

Consideration of academic adjustments avoids stereotyped assumptions about the capabilities of handicapped persons.[25] The College has refused to determine what adjustments are necessary. The district court rubber-stamped the conclusory assertions regarding the inability of Mrs. Davis to safely and effectively perform in the clinical program. The appeals court properly remanded, suggesting that the district court consider the issue of academic adjustments, thus enabling handicapped people to achieve their full potential.

III. A Private Right of Action Exists Under Section 504

A. Section 504 meets the *Cort* v. *Ash* requirements for implying a private right of action.

Every circuit court that has considered the issue has found that a private right of action to enforce Section 504 must be implied under the tests established by this Court in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975).[26]

[25] The college now attempts to assert in its argument that the requirements for a student are coextensive with those of a Registered Nurse. Pet. Bf. at 43. Furthermore, it attempts to construct new situations in which Mrs. Davis might not be able to perform. Pet. Bf. at 44. There is no basis for these contentions in the record, and "a reviewing court is not ordinarily justified in relying on arguments . . . that were not first presented to the trial court." Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (Rehnquist, J., concurring).

[26] See Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Davis v. Southeastern Comm. College, 574 F.2d 1158 (4th Cir. 1978); Doe v. Colautti, #78-1828 (3d Cir. Feb. 8, 1979).

In *Cort,* the Court listed the following four requirements which must be met to imply a private right of action under a statute which does not explicitly provide for one:

1. Is the Plaintiff "one of the class for whose *especial* benefit the statute was enacted."
2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
3. Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the Plaintiff?
4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

The present suit meets all four of the *Cort* requirements for implying a private right of action.[27]

1. *Frances Davis Is One of the Class for Whose Especial Benefit Section 504 Was Enacted.*

This first *Cort* factor is easily met, for as the Senate Committee Report on the 1974 Amendments to the Act proclaimed, "Section 504 was enacted to prevent dis-

[27] Mrs. Davis also sued pursuant to 42 U.S.C. § 1983, which provides a cause of action to redress deprivation, under color of law, of rights secured by the laws of the United States. Congress surely displayed no intention to foreclose a private suit under Section 1983 against a state college to enforce personal rights guaranteed by Section 504. The Fourth Circuit declined to reach Petitioner's Section 1983 claim, basing its decision thus far only on Section 504. Pet. App. 10a.

crimination against *all handicapped individuals* . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other federally-aided programs." S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388. (emphasis added). See also *Kampmeier* v. *Nyquist,* 553 F.2d at 299 (2d Cir. 1977) ("Section 504 . . . is designed specifically for their protection"); and *Lloyd* v. *Regional Transp. Auth.,* 548 F.2d at 1285, n. 25.

Section 7(6) of the Rehabilitation Act, 29 U.S.C. 706(6) *as amended,* defines "handicapped individual" as any person who:

> (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment.

Frances Davis, as a hearing-impaired woman, is obviously a "handicapped individual" within the meaning of Section 7(6). She is therefore "one of the class for whose *especial* benefit the statute was enacted." *Cort,* 422 U.S. at 78. In fact, the College does not dispute that Mrs. Davis meets this first *Cort* factor. Petitioner's Brief at 59.[28]

[28] Several commentators have concluded that this first *Cort* factor is the most important consideration in implying a private right of action. "Indeed, in nearly every Supreme Court case since *Cort,* although the Court goes through the four tests seriatum, the resolution of the first Cort factor seems to be the deciding issue." M. Seng., "Private Right of Action," 27 DePaul L. Rev. 1117, 1123, N. 30 (1978). See also "Toward Equal Rights for Handicapped Individuals· Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973, 38 Ohio State L.J. 667 (1978). The 32 States as Amici Curiae in Support of the Petitioner contend that ". . . one may not assume that a Plaintiff under Section 504 will meet the first prong of the *Cort* test [because] section 504 pertains only to 'otherwise qualified handicapped individuals,' and this involves a preliminary determination by the court." Amici's Brief at 30. Of course, Section 504 pertains only to "otherwise qualified" handicapped individuals, and of course this involves a court determination. But whether a handicapped person is "otherwise qualified" does not affect his/her right to *access to the court* for a determination of that issue. Instead, it affects the validity of her claim on the merits. While all handicapped plaintiffs may not be "otherwise qualified" and hence not entitled to relief on the merits, all have the *right to sue* for a determination of that and other issues affecting the validity of their claims. Section 504 was enacted for the "especial benefit" of all handicapped individuals, not just for those who are "otherwise qualified." Indeed, in this and several other cases, courts have implied a private right of action and *then* decided the issue of whether plaintiff was "otherwise qualified" and hence entitled to relief. See Whitaker v. Bd. of Higher Education of City of NY, 77-C-2258 (E.D.N.Y. Oct. 17, 1978); Davis v. Bucher, 451 F.Supp. 791, 797 (E.D. Pa. 1978); Kampmeier v. Nyquist, 553 F.2d at 299.

2. *There Is Explicit Indication of Congresional Intent to Create a Private Right of Action Under Section 504.*

Where it is clear that the Plaintiff is one of the class for whose *especial* benefit the statute was enacted, "it is not necessary to show an intention to *create* a private cause of action. . . ." *Cort,* 422 U.S. at 82. Accordingly, under *Cort,* Respondent need not demonstrate any specific Congressional intent to create a private right of action.

Nonetheless, such Congressional intent exists in abundance. Both the language and the legislative history of the 1978 Amendments to the Rehabilitation Act support a private right of action. By its very terms, the statutory language of Section 505(b) of the

1978 Amendments expressly recognizes the right to maintain a private action.

> *In any action or proceeding to enforce or charge a violation* of a provision of this Title [V], the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs.

92 Stat. 2983.

The Senate Committee Report [29] on the 1978 Amendments unequivocably explains the purpose of the attorneys' fees section as follows:

> The Committee believes that the rights extended to handicapped individuals under Title V . . . are, and will remain in need of vigilance by handicapped individuals to assure compliance, and the availability of attorneys' fees should assist in vindicating private rights of action . . . under . . . 504.

S.REP.No. 95-820, 95th Cong., 2d Sess. 19 (1979) (emphasis added).[30]

During the Senate floor debate on the 1978 Amendments, Senator Alan Cranston, the Majority Whip, further elaborated on the importance and purpose of the attorneys' fees section:

> Private enforcement of these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect. . . . The Amendment adopted by the Committee would help assure that handicapped individuals will be able to have access to the judicial process in order to assert their rights under Title V.

124 Cong. Rec. S15593 (Sept. 20, 1978). (remarks of Senator Cranston)

Thus, the attorneys' fees section of the 1978 Amendments and its legislative history lead to the inescapable conclusion that there is a private right of action under Section 504.[31]

Section 505(a)(2) of the 1978 Amendments again recognizes the existence of a private right of action. It provides as follows:

> The remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved . . . under § 504.

92 Stat. 2982.

The rights and remedies available under Title VI, and hence now applicable to Section 504, include a private right of action. See *Regents of Univ. of California* v. *Bakke,* 98 S.Ct. 2733, 2814-2815; *Lau* v. *Nichols,* 414

[29] The Senate version of Section 505(b) was accepted by the House-Senate Conference Committee. See H.R.REP.No. 95-1780, 95th Cong., 2d Sess., reprinted in [1979] U.S. Code Cong. & Ad. News 7553, 7582.

[30] The Committee Report goes on to cite with approval the testimony of Debra Kaplan of the Disability Rights Center, who testified at length on the urgent need for attorneys' fees to encourage private rights of action. *Id.* at 19.

[31] This Court has long adhered to the principle that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969); FHA v. Darlington, 358 U.S. 84 (1958); Glidden Co. v. Zdanok, 370 U.S. 530 (1962). Any language in Teamsters v. United States, 431 U.S. 324, n. 39 (1977), minimizing the effect of subsequent legislative history, does not apply to the present case. Here, unlike the situation in Teamsters, the 1978 Amendments relate specifically to the statutory provision upon which Respondent relies and show unambiguously Congressional intent to create a private right of action under the statute.

U.S. 563 (1974); *Bossier Parish School Bd.* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 338 U.S. 911 (1967); *Serna* v. *Portales,* 499 F.2d 1147 (10th Cir. 1974). When Congress passed Section 505(a)(2), the presence of a private remedy under Title VI had been clearly developed. In fact, Senate floor debate on the 1978 Amendments reveals that Congress was quite aware of judicial recognition of a private right of action under Title VI. The following dialogue between Senators Cranston and Bayh is particularly illuminating:

> Mr. BAYH. Senator Cranston, is my understanding correct that section 505 merely extends to the handicapped the same remedies, procedures and rights already extended through title VI and VII of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 to individuals discriminated against on account of race, color, religion, sex or national origin?
>
> Mr. CRANSTON. My colleague from Indiana (Mr. Bayh) is correct.
>
> Mr. BAYH. When title VI was first enacted in 1964, Congress intended to create a private right of action for aggrieved individuals. The circuit courts of the United States have clearly acknowledged this congressional intent in such cases as *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), *Alvarado* v. *El Paso Indep. School Dist.,* 445 F.2d 1011 (5th Cir. 1971), *Kelley* v. *Altheimer, Arkansas Pub. School Dist. No. 22,* 378 F.2d 483 (8th Cir. 1967) and *Cypress* v. *Newport News Gen'l and Non-sect. Hosp. Assoc.,* 375 F.2d 648 (4th Cir. 1967). As the Senator knows, the Supreme Court recently spoke on this issue in the *Bakke* case.
>
> Mr. CRANSTON. I agree with my colleague from Indiana (Mr. Bayh). In the recent court case of *Bakke* against *Regents of the University of California,* eight Supreme Court Justices determined that, with respect to the availability of a private right of action, the question was raised too late in the proceeding and that Bakke had a private right of action available under title VI. Of the eight, four justices specifically concluded that an individual private cause of action was amply supported in the title VI legislative history and four assumed for purposes of the case that Bakke did have a private right of action. Only Justice White concluded that there was no cause of action.

124 CONG.REC. S15593 (daily ed. Sept. 20, 1978) (remarks of Senators Bayh and Cranston).

Viewed in this context, Section 505(a)(2)'s extension of the rights and remedies under Title VI to Section 504 can only be construed as additional explicit support for a private right of action.[32]

The 1978 Amendments thus confirm the Congressional intent, expressed as far back as 1974, that "Sec-

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[32] Petitioner contends that under the interpretation of Section 505(a)(2) by the court in Trageser v. Libbie Rehab. Center, No. 77-2224 (4th Cir. Dec. 18, 1978), cert. filed March 16, 1979, Mrs. Davis cannot maintain a private cause of action. However, the Trageser court specifically noted that Mrs. Davis can maintain a private action. Slip op. at 8, n. 12. The Trageser opinion dealt mainly with the scope of programs and activities covered by Section 504, not with private right of action. The court interpreted Section 505(a)(2) in the context of that issue only. To the extent that it did deal with the private right of action issue, the Trageser court confirmed the private litigant's right to sue under Section 504, provided that his/her claim falls within the scope of activities covered by the statute. As an example of a claim within the scope of the statute and hence maintainable as a private action, the Trageser court specifically cited the Fourth Circuit's opinion in Davis which "was not an employment discrimination case." Slip op. at 8, n. 12.

tion 504 . . . permit[s] a judicial remedy through a private right of action." S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6391. Petitioner contends that this clear statement of legislative intent, refers only to judicial review of administrative action, especially when viewed in context. To the contrary, the Report uses the words "judicial remedy," not "judicial review." And the context of the Committee's statement supports the plain meaning of its words. The Committee Report states as follows:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964 . . . and Section 901 of the Education Amendments of 1972. . . . The language of Section 504, in following the above cited Act, further envisions the implementation of a compliance program which is similar to those Acts. . . . This approach to implementation of Section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation and *permits a judicial remedy through a private action.*

Id., at 6390 (emphasis added).

The Committee's recognition of the right to a "judicial remedy through a private action" is part of a paragraph in which the parallels between Section 504 and Titles VI and IX are emphasized. The Committee Report was issued against a background of judicial approval of private litigation under Title VI. By that time, the Supreme Court and several lower courts had

allowed private suits under Title VI. See, *e.g., Lau* v. *Nichols,* 414 U.S. 563 (1974); *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967); *cert. denied,* 338 U.S. 911 (1967); *Hawthorne* v. *Kenbridge Recreation Assn., Inc.,* 341 F.Supp. 1382 (E.D. Va. 1972).

The fact that Congress, under these circumstances, modeled the language of Section 504 after that used in Title VI, and emphasized those parallels in its Committee Report, is persuasive evidence that it expected private suits to be permitted under Section 504.[33] The Committee Report is especially persuasive in light of the fact that it was written and adopted by the same 93d Congress that passed Section 504 the preceding year.

Despite the weight of the 1974 and 1978 Amendments and their legislative histories, Petitioner and several Amici question whether Congress intended to create a private right of action in a statute silent on its face. See Brief Amicus Curiae Equal Employment Advisory Council at 33-34; Brief of 32 States as Amici Curiae, at 36. But precisely the same statement could be made about a number of cases where this Court has implied a private right of action from a statute silent on its face. See, *e.g., Texas & Pacific Railway Co.* v. *Rigsby,* 241 U.S. 33 (1916); *J. I. Case Co.* v. *Borak,* 337 U.S. 426 (1964); and *Wyandotte Trans. Co.* v. *United States,* 389 U.S. 191 (1967). In-

[33] This Court has recognized that intervening judicial interpretation of predecessor statutes may be highly relevant in construing future legislation patterned after the earlier law. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-426 (1975); and Carolene Products Co. v. United States, 323 U.S. 18, 25-27 (1944).

deed, there would be no need to imply a private right of action if the statute were not silent on its face; this is the very purpose of the *Cort* v. *Ash* test.

In support of its argument, the Brief of 32 States as Amici, at 34, notes that "Congress has not been timid when it wishes to bestow a private right of action" in other statutes. But by the same token, Congress has not been timid when it wished to *deny* a private right of action in still other statutes. Title III of the Older American Amendments of 1975, 42 U.S.C. § 6101 *et seq.*, as originally enacted, is especially instructive. In language similar to that used in Title VI and Section 504, Title III prohibits age discrimination in federally funded programs. 42 U.S.C. § 6102. However, as originally enacted, it also contained the explicit proviso that administrative remedies shall be "the exclusive remedy for the enforcement of [Title III]." 42 U.S.C. § 6104(e). Congress thus demonstrated that it is capable of making its wishes explicit when it wants to restrict the procedures available for enforcing a statute that prohibits discrimination in federally-funded programs.[34]

[34] Section 401 of the 1978 Amendments to the Age Discrimination Act, P.L. 95-478, 92 Stat. 1555, deletes § 6104(e) and adds a new Section allowing private suits if the administrative agency has not acted within 180 days from the date of filing an administrative complaint. The Brief of American Council on Education as Amicus, at 14-15, contends that the absence of similar language in Section 504 indicates Congressional intent to deny an independent private right of action for that statute. It is quite possible, however, that Congress wished to impose no such 180-day restrictions on private suits under Section 504. Indeed, the fact that the Age Discrimination Act originally precluded all private suits indicates that Congress has always sought to restrict the private right of action under that statute. Section 504 has never contained such a proviso.

3. *A Private Right of Action is Entirely Consistent With the Underlying Purpose of Section 504.*

Section 504 also meets the third *Cort* requirement for implying a private right of action. A private remedy is consistent with and promotes the underlying purposes of Section 504. The basic purpose of Section 504 is to eliminate discrimination against handicapped persons in federally funded programs. S.REP.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6388. When read together with the other sections of Title V, 29 U.S.C. § 791 *et seq.*, it is apparent that Section 504 is part of a broad civil rights act for handicapped persons, and that its provisions are to be enforced in a manner similar to other civil rights legislation.

Other Amici contend that the fact that Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, as amended, contains a private action provision indicates Congressional intent to preclude such suits under Section 504. See Brief of 32 States as Amici, at 25. But as with the Age Discrimination Act, the private right of action provided in Section 501 is limited procedurally. See Section 505(a)(1) of the 1978 Rehabilitation Act Amendments, 92 Stat. 2982. It is more plausible to conclude that Congress wished to impose no such procedural limits on private suits under Section 504, especially in light of the significant differences between the administrative procedures established under Section 501 and 504. The 501 procedure is specifically designed to resolve individual complaints. See 5 C.F.R. Part 713. By contrast, the Section 504 administrative procedures and remedies are designed, not to resolve individual complaints, but to enforce the non-discrimination provisions of a contract between HEW and recipients of federal funds. See 45 C.F.R. Part 80. Hence independent judicial remedies are especially necessary to effectuate the Congresional intent of Section 504. See discussion *infra*.

In the context of other civil rights statutes, this Court has recognized that suits by persons acting as "private attorneys general" are an invaluable supplement to administrative enforcement. *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 556 (1969); *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205, 211 (1972); *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 401-402 (1968). In view of the large number of federally funded programs covered by Section 504, "the Act's laudable goal would be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the [federal government]. *Allen,* 393 U.S. at 556 (1969).

This reasoning persuaded the court in *Allen* to imply a private right of action under the Voting Rights Act of 1965, 42 U.S.C. § 1973, *et seq.* The Voting Rights Act, in language similar to that of Section 504, provides that no person shall be denied the right to vote on the basis of race or color. Neither the Voting Rights Act nor Section 504 explicitly authorizes private actions to enforce its provisions. Yet, the court in *Allen* implied a private right of action, notwithstanding the express statutory provision for suit by the Attorney General as a means of enforcing the Act. The Court in *Allen* recognized that if Congress' broad remedial purpose was to be realized, enforcement could not be relegated solely to the federal government. There were simply too many jurisdictions covered by the Act for the Attorney General to properly enforce the statute alone. In fact, the Attorney General, who argued in favor of a private right of action, readily conceded his office's need for help.

So, too, with Section 504, private litigation remains an indispensable tool if the goals of the statute are to be achieved. There are thousands of recipients of federal financial assistance whose actions HEW must monitor. According to Secretary Califano, there are approximately 35,000,000 handicapped persons whose rights HEW must protect. See statement of Joseph A. Califano, Secretary, HEW (April 29, 1977). In addition, the same HEW Office for Civil Rights is responsible for protecting the rights of women and minorities under Titles VI and IX. Its task is enormous. HEW needs and wants help. For that reason, HEW firmly supports a private right of action under Section 504.[35] In an affidavit relied on by the court in *Whitaker* v. *Bd. of Higher Ed. of the City of NY,* 7-C-2258 (E.D.N.Y. Oct. 17, 1978), Michael Middleton, the Director of Policy and Procedure for HEW's Office for Civil Rights, declared:

> It is important that beneficiaries of HEW-funded programs have a choice of forum for complaints of alleged discrimination. The Office for Civil Rights has a large backlog of complaints and there is presently no guarantee that any newly filed complaints can be investigated and resolved in an expeditious manner. It would be inconsistent with the Department's desire and the public's need for the speedy resolution of complaints to prohibit aggrieved parties who wish to file suit from doing so and then subject them to a lengthy period of time before acting upon their claim[s].

Whitaker, slip. op. at 20.

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[35] In Allen, this Court deemed it "significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits." 393 U.S. at 557, n. 23.

In Congressional testimony, David Tatel, Director of HEW's Office for Civil Rights, has also expressed his unqualified support for a private right of action:

> I believe it is important that the private right of action for individuals be preserved. HEW is not in a position and does not have the resources to do the whole job. Therefore, it is important that handicapped individuals have available as many avenues of resources as possible.

1977 House Oversight Hearings at 358.

Thus, private suits are vital to help federal agencies carry out their statutory obligations under Section 504. The mere threat of private suits may well prove a more significant enforcement tool than actual litigation. This Court's confirmation of the right to challenge Section 504 violations in private suits would greatly encourage voluntary compliance, which is consistent, not only with the Congressional intent to eliminate discrimination, but also with the administrative emphasis on voluntary compliance. See 45 C.F.R. Part 80.

Private suits are especially necessary to effectuate the purposes of the statute because of the limited scope of administrative relief under Section 504. As discussed in great detail *infra,* this administrative process was not designed to afford relief to individual victims of unlawful discrimination, *Whitaker,* slip. op .at 18-20; *Rios* v. *Read,* 75 Civ. 296, slip. op. at 14 (E.D.N.Y. Oct. 13, 1978); *Bakke,* 98 S.Ct. at 2814-2815.

If the only remedy available for a violation of Section 504 were a termination of funds, then Congress' anti-discrimination mandate would be an "empty promise" for the very persons who have suffered the discrimination Congress intended to prohibit. Cf. *Allen,* 393 U.S. at 557.

Under similar circumstances in which there was an obvious need for private enforcement, this Court and others have recognized a private cause of action, in addition to the administrative enforcement explicitly contemplated by the statute in question. For example, in *Rosado* v. *Wyman,* 397 U.S. 397, 420 (1970), this Court found that private plaintiffs could sue to enforce a section of the Social Security Act, despite the fact that the statute also provided HEW with the power to terminate federal funds for noncompliance. The Court held that:

> We are most reluctant to assume Congress has closed the avenue of effective judicial review of those individuals most directly affected by the administration of its program. [citations omitted]. We adhere to *King* v. *Smith,* 392 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief. . . .

397 U.S. at 420.

Other decisions also have endorsed a private right of action as a complement to an administrative enforcement scheme. See, *e.g., J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964) (private right of action to enforce SEC proxy rules); *Fitzgerald* v. *Pan American World Airways,* 229 F.2d 499, 501-502 (2d Cir. 1956) (Private right of action to enforce statute prohibiting discrimination in air transportation); *Allen.*[36]

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[36] Amici rely on National RR Passenger Corp. v. National Assn. of RR Passengers, 414 U.S. 453, 458 (1974) for their contention to the contrary. Their reliance on the Amtrak decision is mis-

Direct judicial decisions under Section 504 would pose little, if any, conflict with administrative decisions. In Congressional testimony on the compatibility of judicial and administrative enforcement, David Tatel, Director of HEW's Office for Civil Rights, stated as follows:

> On the question of the private right of action, Section 504 is Federal law, and the courts, as in Title VI and Title IX, are going to interpret it just as HEW does. I assume the Courts will use our regulations as a starting point, but my guess is that judicial decisions will help to flush out the law as we go through the next several years; but I don't see any problems of inconsistency at this point.

1977 House Oversight Hearings, at 366.

It is thus highly unlikely that direct judicial enforcement of Section 504 would interfere or conflict with

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placed. The legislative history of the statute at issue in Amtrak revealed that Congress was aware that the statute permitted private suits only in certain limited circumstances and deliberately rejected a proposal that would have expanded a private right of action. 414 U.S. at 458-461. This legislative background strongly supported the Court's conclusion that only those private suits explicitly authorized by statute should be allowed to proceed. See also T.I.M.E., Inc. v. United States, 359 U.S. 464, 471-472, 477, n. 18 (1959). No such evidence of legislative intention is present in this case. Moreover, one commentator has argued that restrictive application of the Cort test for economic regulatory statutes, such as those at issue in Amtrak and T.I.M.E., has no relevance in the context of civil rights statutes. "The cases finding private rights of action under civil rights statutes . . . indicate a consistently favorable attitude toward permitting suits under such statutes." Note, "Implied Rights of Action to Enforce Civil Rights Statutes: The Case for a Sympathetic View," 87 Yale L.J. 1378, 1388 (1978). See also "Toward Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973, 38 Ohio State L.J. 677 (1977).

agency implementation of the statute, for the courts will continue to accord great weight to agency regulations and guidelines. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The Fourth Circuit's opinion in the present case is a perfect example of this judicial deference to agency interpretations.

Justice Stevens, in *Bakke,* 98 S.Ct. at 2814-2815, presented yet another compelling reason why a private right of action is totally compatible with administrative enforcement. He distinguished between a private action brought to end a particular discriminatory practice and an action brought to cut off federal funds:

> Section 601 is specifically addressed to personal rights while § 602—the fund cut-off provision—established "an elaborate mechanism for *governmental* enforcement by federal agencies." Arguably private enforcement of the "elaborate mechanism" would not fit within the Congressional scheme . . . but Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses is clear and significant.

98 S.Ct. at 2814, n. 26.

The relief requested in private suits under Section 504 will rarely, if ever, include fund termination, which is the primary administrative remedy. A private plaintiff is unlikely to derive any benefit from fund termination. Mrs. Davis, like Alan Bakke, filed suit because she wanted to be admitted to nursing school, not because she wanted to block future financial aid to the College. Thus, the possibility of conflict between judicial and administrative remedies is minimal. *Rios* v. *Read,* 75 Civ. 296 (S.D.N.Y. Oct. 13, 1978); *Whitaker* v. *Bd. of Higher Educ. of City of NY,* 77-C-2258 (E.D.

N.Y. Oct. 17, 1978); *Guardians Assn. of N.Y.* v. *N.Y. City Civil Service Comm.*, 47 U.S.L.W. 2561 (S.D. N.Y. 1979).

In sum, a private right of action would not only provide an avenue for the vindication of personal rights under Section 504, but would also aid HEW and other federal agencies by serving as an additional deterrent to violations. A private remedy under Section 504 ". . . is therefore not only compatible with the legislative intent, but also is necessary to secure the Act's remedial purposes." *Davis* v. *Bucher*, 451 F.Supp. 791, 798 (E.D. Pa. 1978).

4. *The Imposition of Reasonable Anti-Discrimination Regulations on Recipients of Federally Funded Programs Is Traditionally an Area of Federal, Not State Concern.*

The fourth and final *Cort* factor is met since prohibitions against handicap discrimination in federally funded programs are surely not matters "traditionally relegated to state law, in an area basically the concern of the states." *Cort*, 422 U.S. at 78. The power exercised in Section 504 is a uniquely federal power. It is the power to control the expenditure of federal funds and to impose conditions on the way those funds may be used. Congress has often enacted, and the Court has upheld, legislation of this sort to impose reasonable regulations on recipients of federal financial assistance. See, *e.g.*, *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127 (1947); *Lau* v. *Nichols*, 414 U.S. 563 (1974).

The right conferred by Section 504 is a uniquely federal right. It is the right to be free from discrimination in federally funded programs. Accordingly, federal courts, when called upon to vindicate the personal rights guaranteed by Section 504, have no occasion to defer to state law. Section 504 should be enforced according to a uniform federal standard, without dependence on the vagaries of state provisions concerning discrimination on the basis of handicap.[37]

B. Case law confirms the existence of an independent private right of action under Section 504

As noted earlier, a private right of action under Section 504 has been upheld by every court of appeals that has considered the issue. Most of the district courts passing on the issue have also found that a private right of action exists under Section 504.[38]

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[37] In support of their argument that handicapped discrimination is an area of state concern, the Brief of 32 States as Amici, at p. 39, points to the existence of various state laws prohibiting employment discrimination on the basis of handicap. Amici disregard the fact that many of these state statutes were enacted only *after* the passage of Section 504. See, *e.g.*, Art. 4419 (3), Tex. Civ. Stat. Ann. (1975); Va. Code Ann. § 40.1-28.7 (1976). See also Drennon v. Phila. Gen'l Hosp., 428 F.Supp. at 815, noting that employment of the handicapped has only recently been included as a goal of the Pennsylvania Human Relations Act. Many of these state remedies were inspired by Section 504; they were not intended to assert exclusive state control over handicap discrimination problems. In fact, the Virginia handicap discrimination statute, expressly excludes from the scope of its coverage, those employers already covered by Title V. Va. Code Ann. § 40.1-28.7 (1976) (emphasis added) provides as follows:

> No employer shall discriminate in employment or promotion practices against any person on account of physical handicap which is unrelated to the person's qualifications and ability to perform the job. *This section shall not apply to employers covered by the Federal Rehabilitation Act of 1973.*

[38] See Whitaker v. N.Y. Bd. of Educ., 77-C-2258 (E.D.N.Y. Oct. 19, 1978); Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978); Simon v. St. Louis County, C.A. 77-114-C(4), (E.D. Mo. 1977);

Moreover, in *Campbell* v. *Kruse*, 434 U.S. 808 (1977), this Court implicitly recognized the existence of a private right of action. The Court reviewed a decision in which a three-judge federal district court resolved a private suit on constitutional grounds without ruling on the appellee's claim under Section 504. The Court vacated the judgment below and remanded ". . . with directions to decide the claim based on the federal statute, § 504 of the Rehabilitation Act of 1973. . . ." 434 U.S. at 808.

Again in *Bakke*, 98 S.Ct. at 2814-2815, four members of this Court recognized the existence of a private right of action under Section 504, while four others assumed its existence for purposes of that case. In finding a private right of action under Title VI, Justice Stevens' opinion specifically cited Section 504 as an example of legislation which "Congress has repeatedly enacted . . . predicated on the assumption that Title VI may be enforced in a private action." 98 S.Ct. at 2814-2815, n. 27.[39]

Vanko v. Finley, 440 F.Supp. 656 (N.D. Ohio 1977); Jayne v. Univ. of Nevada, Reno, Civ. No. R-76-183 BRT (D. Nev. June 10, 1977); Mich. Paralyzed Vets of America v. Coleman, C.A. 5-71114 (E.D. Mich. Nov. 3, 1977); Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D. Pa. 1977); NY State Assn. for Retarded Children, Inc. v. Carey, 72-C-356 (E.D.N.Y. Sept. 14, 1978).

[39] Justice Stevens also noted that, "to date, the Courts, including this Court, have unanimously concluded or assumed that a private right of action may be maintained under Title VI." 98 S.Ct. at 2814-2815. He concluded that Title VI met all four of the Cort requirements for implying a private right of action. 98 S.Ct. at 2815, n. 28. This analysis with respect to Title VI applies equally to Section 504, in light of Section 505(b)(2) of the Rehabilitation Amendments of 1978. See discussion *supra*.

Justice Stevens also cited with approval the Seventh Circuit's analysis of Section 504 in *Lloyd* v. *Regional Transp.Auth.*, 548 F.2d 1277 (7th Cir. 1977). Yet the College contends that the *Lloyd* analysis needs reconsideration because of its misplaced reliance on *Lau* v. *Nichols* for the principle that Title VI creates a private right of action.[40] Petitioner's Brief at 58. While it is true that *Lau* only implicitly recognized a private right of action under Title VI, the Court did hear arguments on the issue. See Respondent's Brief in Opposition to Petition for Certiorari, at 7. And the Court expressly decided the private Title VI claim on its merits and refused to reach Petitioners' Equal Protection claims. *Lau* thus acknowledged the legitimacy of private suits under Title VI.

Finally, those who would question the *Lloyd* decision because of its reliance on *Lau* forget that *Lloyd* relied alternatively on the *Cort* v. *Ash* test for implying a private right of action. Its decision was not based solely on *Lau*. The *Lloyd* court engaged in an extensive analysis of the *Cort* v. *Ash* factors, an analysis which four members of this Court cited with approval in *Bakke*, 98 S.Ct. at 2814-2815.

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[40] Petitioner ignores the many decisions, in addition to Lau, which "have unanimously concluded or assumed that a private right of action may be maintained under Title VI." Bakke, 98 S.Ct. at 2814-2815. Petitioner also attacks the Lloyd Court's reliance on Lau by noting that the same Seventh Circuit that decided Lloyd rejected the notion that Lau supports a private right of action under Title IX in Cannon v. Univ. of Chicago, 559 F.2d 1063 (7th Cir. 1977). From this, Petitioner erroneously concludes that the Seventh Circuit has repudiated that portion of its Lloyd opinion that relied upon Lau. Petitioner's Brief at 59. However, the Seventh Circuit decided Lloyd *after* its first opinion in Cannon which rejected the applicability of Lau to Title IX. The Lloyd Court specifically stated that it did not view Cannon as controlling. 548 F.2d at 1287.

IV. The Doctrines of Administrative Exhaustion and Primary Jurisdiction Do Not Apply to Present Case

A. The issues of administrative exhaustion and primary jurisdiction are not properly before this Court.

Petitioner erroneously contends that if a private right of action is found, the Court must consider the issues of exhaustion of HEW administrative remedies and primary jurisdiction. Neither the district court nor the court of appeals considered these issues. Indeed neither court ever determined whether administrative remedies even exist. The Fourth Circuit thus properly remanded to the District Court with instructions to consider these legal issues, if it demed advisable.[41]

Clearly, then these issues, like the issue of affirmative relief discussed *supra,* are new matters which cannot be raised in this Court. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971); *United States* v. *Estate of Donnelly,* 397 U.S. 286 (1970); *Adickes* v. *Kress and Co.,* 398 U.S. 144 (1970); *Tennessee* v. *Dunlap,* 426 U.S. 312 (1976).

B. Frances Davis need not exhaust this inadequate and ineffective HEW administrative remedy

Assuming *arguendo* that the issue of administrative exhaustion is properly before the Court, that doctrine should not prevent Frances Davis from bringing a private cause of action.

"It is well settled that administrative remedies need not be sought if they are inherently inadequate or are

[41] The Brief of Equal Employment Advisory Council, as Amicus in Support of Petitioner, at p. 37, concedes this point.

applied in such a manner as in effect to deny the petitioners their rights." *McCoy* v. *Greensboro City Bd. of Education,* 283 F.2d 667, 670 (4th Cir. 1960). See also *Smith* v. *Ill. Bell Tel. Co.,* 270 U.S. 587, 591-592 (1926); *Walker* v. *Southern Ry. Co.,* 385 U.S. 196 (1966); *K. Davis, Administrative Law Treatise* §§ 20.01, 20.07 (1958).

Applying this principle to the present case, exhaustion is not required because the HEW administrative remedy is inadequate in the following respects:

1. At the time Mrs. Davis filed the suit, there was no HEW administrative procedure available for her to exhaust;

2. HEW's administrative procedures are not designed to vindicate the individual rights protected by Section 504; and

3. HEW's excessive and undue administrative delay in investigating complaints may render that remedy entirely meaningless and ineffective for Mrs. Davis.

As discussed in greater detail *infra,* exhaustion is never required under any of these circumstances.

1. *There Was No Administrative Procedure Available for Mrs. Davis to Exhaust When She Filed Suit.*

At the time Mrs. Davis filed this suit, the HEW Regulation creating an administrative procedure had not yet been issued. Accordingly, there was no administrative procedure available for her to exhaust. Under such circumstances, the exhaustion doctrine obviously does not apply. *Bossier Parish School Bd.* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 338 U.S. 911 (1967); *Deering Milliken, Inc.* v. *Johnston,* 295 F.2d

856 (4th Cir. 1961); *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d at 1286.

Petitioner contends that the *Lloyd* case permitted a private right of action "only because no administrative enforcement procedures had at that time been established." [42] Petitioner's Brief at 63. But even under this narrow interpretation of *Lloyd* and the scope of a private right of action, the exhaustion doctrine does not apply to the facts of the present case. As in *Lloyd,* the HEW Regulation was not in effect at the time Mrs. Davis filed suit. There was no administrative procedure available for her to exhaust. Like the Plaintiff in

[42] Petitioner's argument ignores the fact that many cases, including this Court's decision in Campbell v. Kruse, 434 U.S. 808 (1977), recognized a private right of action under Section 504 even after administrative procedures had been established. See also Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); Whitaker v. Bd. of Higher Educ. of City of NY, slip op. at 18; Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978); Mich. Paralyzed Vets of America v. Coleman, CA. 5-7114 (E.D. Mich. Nov. 3, 1977); Simon v. St. Louis County, Mo., CA. 77-114-C(4) (E.D. Mo. Jan. 31, 1978). None of these courts saw fit to depart from the result in Lloyd simply because the anticipated administrative enforcement scheme had taken effect. Petitioner also contends that the HEW Regulation constitutes the "meaningful administrative enforcement mechanism" referred to by the Lloyd court, 548 F.2d at p. 1286, n. 29. See Petitioner's Brief at 64. But, for the reasons listed *supra,* the HEW procedures are not a "meaningful administrative enforcement mechanism" for Frances Davis. See also *Whitaker,* slip op. at 18-20; Rios v. Read, slip op. at 14. But see *contra,* Doe v. New York University, 442 F.Supp. at 522, 1978. While the court in Doe found the Section 504 administrative remedies effective "on paper," the court went on to say that "if HEW does not or cannot provide an effective remedy, a decision to bypass the administrative machinery would rest on a substantial ground." 442 F.Supp. at 524. Thus it is obvious that any inadequacies in the HEW administrative remedies were not fully considered by the court in Doe.

Lloyd, Mrs. Davis had no choice but to seek judicial relief if she hoped to vindicate her statutory rights.[43] "When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts." *Lloyd,* 548 F.2d at 1286.

2. *The HEW Administrative Remedy Cannot Vindicate the Personal Rights of Mrs. Davis*

Justice Stevens, speaking for four Justices of this Court in *Bakke,* 98 S.Ct. at 2814-2815, found that Title VI "involves personal federal rights that administrative procedures would not, for the most part, be able to protect." Accordingly, Justice Stevens concluded that Alan Bakke should be allowed to totally bypass the Title VI administrative enforcement procedures.[44] See also *Guardians Assn. of NY* v. *NY City Civil Service Comm'n.,* 47 U.S.L.W. 2561 (S.D.N.Y. 1979); *Whitaker* v. *Bd. of Higher Educ. of City of NY,* 77-C-2258 (E.D.N.Y. October 17, 1978); *Rios* v. *Read,* 75 Civ. 296 (S.D.N.Y. Oct. 13, 1978).

The enforcement procedures under Section 504 are the same as Title VI procedures which were found

[43] The Amicus Brief of the Equal Employment Advisory Council, at p. 37, concedes this point.

[44] The Brief of 32 States as Amici, at 53, cites several cases in support of their contention that one cannot bypass Title VI administrative remedies. See Green St. Assn. v. Daley, 373 F.2d 1 (7th Cir. 1967); Johnson v. Chester County, 413 F.Supp. 1299 (E.D. Pa. 1976); Dupree v. Chatanooga, 362 F.Supp. 1136 (E.D. Tenn. 1973). But each of the cases cited involved suits by private litigants seeking fund termination, not personal redress. As Justice Stevens noted in Bakke, "the difference between these two courses is clear and significant." 98 S.Ct. at 2814, n. 26. See discussion, *supra.*

incapable of vindicating personal rights in *Bakke*. See 45 C.F.R. § 84.61. For the very same reasons, Frances Davis should be allowed to bypass this administrative mechanism.

In *Whitaker,* slip op. at 18-20, the Court held that the HEW administrative process, "by its very terms," is not designed as an individual complaint procedure. Instead, it is designed to monitor and enforce the non-discrimination provisions of a contract between HEW and recipients of federal financial assistance. The HEW Regulation focuses on the rights of these two parties, not the individual complainant.

The Regulation only requires HEW to investigate an individual complaint; it need not resolve the matter on the individual's behalf. 45 C.F.R. § 80.7(c). In fact, HEW can totally ignore the individual victim of past discrimination in its efforts to secure voluntary compliance. See Todd, "Title IX of the 1972 Education Amendments. Preventing Sex Discrimination in Public Schools," 53 Texas L.Rev. 103, 120 (1974).

If voluntary compliance efforts fail, an administrative hearing is held. 45 C.F.R. § 80.8. The purpose of the hearing is to provide HEW with a forum to initiate fund termination proceedings. 45 C.F.R. § 80.8(c). The hearing is not intended to provide, nor has it operated as, a forum for individual complainants to obtain individual relief. The individual complainant does not become a party to any of the proceedings. 45 C.F.R. § 81.23.

Both HEW and the recipient have the right to be represented by counsel and to present relevant evidence. 45 C.F.R. § 80.9(c) and (d). The individual

complainant, however, has no such rights. "Indeed, the only relationship he may have with these proceedings is the receipt of a notice that an administrative hearing is going to be held." *Whitaker,* slip op. at 19.

Moreover, as noted earlier, the remedy resulting from the administrative hearing—fund termination—"is not designed to give the type of relief available in the District Court." *Rios* v. *Read,* slip op. at 14. See also *Guardians,* 47 U.S.L.W. at 2561; Note, "Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View," 87 Yale L.J. 1378, 1406 (1978). "In short while the administrative process may effectively provide, by way of the threat of fund termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a Section 504 violation." *Whitaker,* slip op. at 20. See also, *Rosado* v. *Wyman,* 397 U.S. 397 (1970).

Because HEW's administrative procedure could not vindicate her personal rights, Frances Davis turned to the federal courts as her only viable alternative. "The more clearly it is established that alternative remedies fail in theory and practice, the stronger the case for implying private actions." L.A. Albert, "Standing to Challenge Administrative Action: An Inadequate Claim for Surrogate for Relief," 83 Yale L.J. 425, 454 (1974).

3. *Excessive and Undue Administrative Delay May Render HEW's Administrative Remedy Inadequate and Ineffective in this Case*

It is well-established that excessive and undue administrative delay in enforcement may render an administrative remedy so inadequate as to totally excuse

exhaustion. *Walker* v. *So. Ry. Co.*, 385 U.S. 749 (1966); *Smith* v. *Ill. Bell Tel. Co.*, 270 U.S. 587 (1926).

The heavy backlog of race, sex and handicap complaints at HEW's Office for Civil Rights has persuaded two courts to conclude recently that Section 504 "exhaustion procedures are meaningless." *Camenisch* v. *University of Texas*, No. A-78-CA-061, slip op. at 3 (W.D. Tx. May 17, 1978); *Whitaker*, slip op. at 20.

"HEW itself . . . had represented to the Court that there is a large backlog of [Section 504] complaints and there is no guarantee that any newly filed complaint can be investigated and resolved in an expeditious manner. Accordingly . . . there clearly is still no effective administrative enforcement mechanism." *Whitaker*, slip op. at 20. See also Testimony of David Tatel in 1977 House Oversight Hearings at 358.

In the present case, no evidence has been taken on whether HEW's delay in enforcing Section 504 complaints has rendered that administrative remedy inadequate for Mrs. Davis. Accordingly, the Fourth Circuit properly remanded for consideration of whether Mrs. Davis should be required to exhaust.

C. The doctrine of primary jurisdiction does not apply to the present case

The doctrine of primary jurisdiction does not apply to the present case because of the same administrative inadequacies which entitle Mrs. Davis to bypass exhaustion. As the court in *Lloyd* stated, "There being no administrative remedy open to these plaintiffs, neither the exhaustion *nor primary jurisdiction* doctrine applies." 548 F.2d at 1287, cited with approval in *Whitaker*, slip op. at 20 (emphasis added).

Moreover, the basic rationale for asserting primary jurisdiction simply has no relevance to the present case. Classically, the primary jurisdiction doctrine is reserved for situations in which there is no ascertainable standard for a court to enforce and determination of that standard has been delegated to an administrative body assumed to have special expertise in the area. See, *e.g.*, *Texas and Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423 (1975). Or the doctrine is reserved for situations in which "issues of fact not within the conventional experience of judges [are raised]," or where the statutes call for ". . . the exercise of administrative discretion." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952).

None of these situations exists in the present case. There is no problem with finding a standard for the Court to enforce; HEW has issued detailed regulations implementing Section 504. Courts are highly experienced in and well suited to the tasks of adjudicating discrimination complaints and interpreting regulations. The numerous Section 504 cases already decided by the courts indicate that the courts do, in fact, have the requisite expertise to adjudicate such claims. In the words of Judge Friendly, "[I]t is hard to conceive a task more appropriate for federal courts than to protect civil rights. . . ." H. Friendly, *Federal Jurisdiction: A General View*, 90 (1973). Accordingly, there is no need to allow HEW to take primary jurisdiction in this case.

CONCLUSION

For these various reasons, the judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

SEYMOUR DUBOW
MARC P. CHARMATZ
LARRY J. GOLDBERG
ANDREW S. PENN

THE NATIONAL ASSOCIATION OF
THE DEAF LEGAL DEFENSE FUND

P.O. Box 1793
7th Street & Florida Ave., N.E.
Washington, D.C. 20002
(202) 547-0540

PHILIP A. DIEHL
WARREN L. PATE
127 W. Edinborough Avenue
Raeford, North Carolina 28376
(919) 875-3349

Counsel for Respondent

March 31, 1979

APPENDIX

Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government

Report Prepared for:

Senate Committee on Human Resources

Senate Committee on Veterans' Affairs

House Committee on Education and Labor

House Committee on Veterans' Affairs

September 30, 1978

U.S. Civil Service Commission

OCCUPATIONS MOST FREQUENTLY HELD BY HANDICAPPED FEIERAL EMPLOYEES

APPENDIX F

	OCCUPATIONAL SERIES NUMBER	TOTAL NO. HANDICAPPED	HEARING IMPAIRMENTS		
			HEARING IMPAIRED TOTAL	DEAF	HARD OF HEARING
General Crl. & Admin.	301	9,567	871	104	767
Nursing Asst.	621	4,665	302	4	298
Supply Clerical	2,005	3,083	280	28	252
Clerk Typist	322	2,908	346	66	280
Nurse	610	2,670	156	1	155
Secretary	318	2,639	194	0	194
Mail & File	305	2,215	239	79	160
Engin. Tech	802	2,174	264	11	253
Computer Spec.	334	1,904	194	26	168
Electronics Tech.	856	1,533	178	4	174
Accounting	510	1 454	156	24	132
Contract Procuremen+	1,102	1,372	108	1	107
Medical Officer	602	1,348	86	1	85
Contact Repres.	962	1,331	78	1	77
Tax Accounting	592	1,185	111	24	87

DATA SOURCE: CENTRAL PERSONNEL DATA FILE

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 933-5106

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472
(919) 642-7151

Counsel for Petitioner

April 20, 1979

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The briefs of respondent and various supporting *amici* suffer from misconceptions about the language and the meaning of Section 504, particularly as applied to a clinical training program that directly involves the health and safety of those who are ill and hospitalized. They suffer, too, from a misinterpretation of the legislative intent with respect to the availability of private rights of action under Section 504.

1. The language of Section 504

Like the Fourth Circuit, respondent and most of the supporting *amici* ignore the first and basic approach to any problem of statutory interpretation: "The starting point in every case involving construction of a statute is the language itself." *Beal v. Doe*, 432 U.S. 438, 444 (1977), quoting from *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). And "the language of a statute controls when sufficiently clear in its context." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

The language of Section 504 "in its context" is both clear and conclusive. In contrast to Sections 501 and 503, it says nothing about affirmative action programs; nor does it say anything about adjusting or modifying any physical qualifications deemed essential or appropriate to safe performance in any program or activity. Its rather lean terminology begins with a quick reference to the essential predicate to the entire provision – i.e., that the handicapped person must be "otherwise qualified." If he is not physically or mentally qualified to participate safely and effectively in the program in question, Section 504 does not come into operation. But if he is so qualified, Section 504 establishes a duty not to discriminate against, or exclude, the qualified handicapped person "solely by reason of his handicap."

It appears that physical qualification is not only a predicate requirement but is a concept quite different from the other Section 504 concepts of being handicapped and being excluded "solely by reason of his handicap." By referring only to those handicapped persons who are "otherwise qualified," Section 504 disavows any guaranteed admission to a clinical program for any and all handicapped persons

regardless of their physical disabilities. Nor does it command that any unqualified person be admitted simply because he is handicapped. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971).

In so making one's qualification the controlling predicate for invoking Section 504, Congress kept intact all the reasonable and non-discriminatory tests used by program administrators to determine who is qualified to participate safely in the program. In many purely academic programs, qualifications can be assessed without reference to any physical disability. And in some academic programs, special assistance and program modifications may be necessary to permit full participation by an "otherwise qualified" handicapped applicant.

But in some clinical programs, such as those in the medical and nursing areas, physical dexterity and functional use of all physical abilities and skills may be critically necessary to safe and effective participation. In that context, the existence of a physical handicap may be quite relevant to the assessment of the applicant's physical qualifications. If the handicap is so severe as to make likely a performance that is unsatisfactory and unsafe, the applicant can reasonably be deemed unqualified. Such a result, however, does not reflect the kind of handicap discrimination that concerns Section 504. Exclusion of an unqualified applicant, solely because his handicap renders him physically unqualified to participate, merely reflects a handicapped person's inability to meet the predicate requirement of Section 504 that he be "otherwise qualified."

In other words, as both the District Court and the H.E.W. have said, the "otherwise qualified" language in Section 504 denotes a handicapped individual who can meet all program-

related physical qualifications "in spite of" the handicap.[1] Any other interpretation produces the absurd result reached by the Fourth Circuit, whereby the handicapped person must be admitted to any kind of a program if he meets all qualification standards "without regard to" or "except for" the handicap.[2]

Many of the opposing briefs exhibit confusion about the effect that one's physical handicap may have upon one's qualification to participate in a physically-oriented clinical program. Thus respondent repeatedly asserts that the petitioner College, in finding the respondent unqualified to participate in the nursing program because of her severe hearing defect, acted "on the basis of false stereotypes" and created "an absolute bar against any hearing-impaired person being admitted to nursing school." Resp. Br. 10, 15. Such an assertion is not supported by any finding of the District Court or by any evidence in the record. Even as argument, such an assertion misconceives the nature of the physical qualifications appropriate to participation in a clinical nursing program. And the assertion further misses the effect that a physical handicap may have upon one's ability to meet such physical qualification standards.

The short of it is that consideration of a physical handicap in the clinical context is at least as relevant, if not more so, as consideration of one's academic record. A physical handicap is a physical fact of life, a fact which has a meaning and an impact even when divorced from any stereotyped or dis-

---

[1] The District Court's statement to that effect appears at Pet.App. 20a. The H.E.W.'s statement to that effect appears in its analysis of its own §84.3(k) definition of the term "qualified handicapped person," 45 C.F.R. Part 84, Appendix A, p. 376.

[2] The Fourth Circuit's statement to that effect appears at Pet. App. 5a.

criminatory attitudes toward the handicapped. Unlike such matters as race, religion, national origin and sex, a physical disability dare not be disregarded in determining eligibility for the pursuit of certain physical endeavors.

This confusion as to the role of physical defects under Section 504 is further evident from the argument in the opposing briefs that handicapped persons are not to be excluded from participation in federally funded programs because of the recipient's refusal to make reasonable adjustments in its programs or to provide auxiliary aids to the handicapped applicant. But such adjustments and assistance, to the extent that they are required by Section 504, are designed solely (1) to ensure that the recipient's admission standards do not discriminate against the "otherwise qualified" handicapped person, and (2) to permit full participation in a program by such an "otherwise qualified" person. These forms of assistance to the handicapped are not directed at changing the physical qualifications reasonably required by a program; nor are they a means of changing one's physical status or one's capacity to meet physical qualifications related to safe performance in the program.

Indeed, the implementing regulations of the H.E.W. are entirely consistent with the maintenance of program-related physical qualifications. In the course of requiring that a recipient make modifications in its academic requirements to ensure that the requirements do not discriminate against a qualified handicapped applicant, 45 C.F.R. §84.44(a), the H.E.W. has provided:

> "Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section."

By the same token, clinical and physically-oriented program requirements that are essential to the program of clinical instruction or to a directly related licensing requirement – as is certainly true in the instant case – cannot be deemed discriminatory. More importantly, such clinical program requirements need not be modified or changed, even under the H.E.W. regulations, to meet the needs of the handicapped person who is *not* "otherwise qualified." Under §84.3(k)(3), a handicapped person is not considered "otherwise qualified" unless he can meet all "academic and technical standards requisite to admission or participation in the recipient's education program or activity."[3] It follows that program modifications need not be made to accommodate those who cannot meet such standards.

Some of the confusion in this case as between the concepts of physical qualification and being handicapped is generated by the somewhat ambivalent H.E.W. regulation, §84.42 (b)(4), that prohibits the program recipient from making a "preadmission inquiry as to whether an applicant for admission is a handicapped person," but permits the recipient, after admission, to "make inquiries on a confidential basis as to handicaps that may require accommodation."[4] The H.E.W.

[3] The H.E.W. has defined the term "technical standards" as referring to "all nonacademic admissions criteria that are essential to participation in the program in question." H.E.W. Analysis, 45 C.F.R. Part 84, Appendix A, p. 377. Physical criteria are obviously included within that definition, as are such factors as work experience, degree prerequisites and residency requirements. Respondent's effort to imply that only those latter three factors are included in the definition is baseless. See Resp. Br. 28.

[4] The H.E.W. considers that §84.42(b)(4) "generally prohibits preadmission inquiries as to whether an applicant has a handicap . . . [but] does, however, allow inquiries to be made, after admission, but before enrollment, as to handicaps that may require accommodation." H.E.W. Analysis, 45 C.F.R. Part 84, Appendix A, p. 388.

has stated that the considerations underlying that regulation are the same as those relative to the preemployment inquiry regulation, §84.14(a), which provides that a recipient, while forbidden to make preemployment inquiry as to whether the applicant is handicapped, or as to the nature of the handicap, can make "preemployment inquiry into an applicant's ability to perform job-related functions."[5] The latter inquiry would appear relevant to a determination of the handicapped person's physical qualifications, although it is difficult to see how an informed decision could be made in that respect without some kind of inquiry into the nature of the handicap.

These regulations provide no clear guideline as to how the program recipient is supposed to implement whatever reasonable and nondiscriminatory physical qualification standards may be requisite to safe performance. These regulations simply do not address that problem. Their sole concern is with the preadmission inquiries permissible in the essentially academic educational program, where the fact and the nature of the handicap have little or no relevance to the applicant's qualifications. And when the respondent and others try to apply those academic inquiry standards to those inquiries that are necessary in the execution of physical qualification requirements the resulting confusion is understandable, but not justifiable.

But not even the respondent suggests that Section 504 or the H.E.W. regulations really mean to preclude evaluation of "handicapped applicants on the basis of their qualifica-

[5] Using an example to explain §84.14(a), the H.E.W. has said that "an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees." H.E.W. Analysis, 45 C.F.R. Part 84, Appendix A, p. 381.

tions." Resp. Br. 27. That being true, and since a given handicap may vitally affect one's ability to meet physical qualifications, it follows that it is not discriminatory or otherwise unlawful to inquire fully as to whether the applicant has a disability that would preclude safe and effective performance in the program.

That is what has happened in this case. The respondent had a severe hearing handicap, which she readily conceded and which was obvious to all. In a commendable attempt to test the extent of this disability and the effect it would have upon her ability to perform program-related physical activities, the College suggested that extensive audiological testing be made. After this highly personalized and nondiscriminatory inquiry the College concluded that the respondent was not physically qualified to perform the clinical portions of the nurse training program, wherein she would care for and keep in constant communication with those lying ill in hospitals. Far from acting on the basis of false stereotyped notions respecting all handicapped applicants, the College acted responsibly and in the best interests of the respondent, the untold number of patients that she might serve during the training program, and the North Carolina accrediting and licensing authorities that had delegated to the College the duty of determining and training only those who are fully qualified to perform all the physical tasks expected of professional RNs.

All of which is to say that the respondent totally failed to carry her burden of proving even a prima facie case of discrimination or exclusion solely by reason of her handicap. Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973).

2. The overriding public concerns

The opposing briefs, like the Fourth Circuit, remain silent as to the overriding concern in this case – the public interst in having the safest possible nursing care for those who are ill or injured. And they are equally silent about the uncontested determination of the District Court that respondent's severe hearing handicap, even with the assistance of a hearing aid and the ability and need to lip read,

> ". . . actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations." Pet. App. 20a.

That "potential danger to patients," that inability to function properly and safely as a nurse trainee and as a professional RN, reflects the overriding public concern in this case. It emphasizes the absurdity of the Fourth Circuit's reading of Section 504, a reading that would require (1) that this severe handicap be ignored in assessing the respondent's qualifications, and (2) that she be admitted and trained in a program in which her handicap and inability to communicate fully would create a constant hazard and danger to hospitalized patients under her clinical care. And that threat to the safety and well being of those under her care exposes the futility and inapplicability of the "affirmative relief" suggested by the Fourth Circuit – the addition of more auxiliary hearing aids, the modifications of academic courses, and possibly the elimination of clinical courses or the use of one-on-one supervision for the unqualified nurse trainee.

This obvious public concern that the safest possible nursing care be provided the ill is a major reason why nurse trainees must be drawn from the national pool of those who are able-bodied in the fullest physical sense. To comply with that public concern, the nursing school degree, as well as the RN license, must be able to signify that the individual is prepared for entry into the nursing profession with the knowledge and the physical skills to function safely in a broad variety of clinical situations and to render a broad spectrum of patient care.[6] Most medical and nursing schools are not in the business of training seriously handicapped individuals who can perform only certain tasks without endangering the patients.

An informed idea of the physical skills essential to the development of safe nursing practices can be gleaned from the recent model guidelines, promulgated by the Association of American Medical Colleges, for use in the medical school admissions process. These guidelines were developed in response to the Section 504 nondiscrimination obligation, and appear in full in Appendix A of the *amicus* brief of that Association filed in this Court in this case. With only the modifications necessary to reflect the subordinate responsibility role of nurses, these medical school guidelines serve as a responsible and authoritative measure of the physical and clinical qualifications requisite for admission to a nurse training program.

Of particular relevance in those guidelines is the detailing of the five significant physical abilities and skills that qualify a candidate for the M.D. degree – and, for all practical purposes, for an Associate Degree in Nursing. See Appendix A of the Association's *amicus* brief, pp. 8a-11a. Those five va-

6 "It is well to bear in mind that respondent was attending a medical school where competence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses." *Board of Curators v. Horowitz*, 435 U.S. 78, 95 (1978) (Powell, J., concurring).

rieties include (1) observation, encompassing the functional use of the sense of vision, somatic sensation, and smell; (2) communication, encompassing the ability to speak, to hear and to observe; (3) motor, encompassing the motor function of eliciting information from patients by palpation, auscultation, percussion, and other diagnostic maneuvers; (4) intellectual-conceptual abilities; and (5) behavioral and social attributes. Of the most immediate concern in this case is the second or communication skill, which is described in the model guidelines as follows:

> "II. *Communication:* A candidate should be able to speak, to hear and to observe patients in order to elicit information, describe changes in mood, activity and posture, and perceive nonverbal communications. A candidate must be able to communicate effectively and sensitively with patients. Communication includes not only speech but reading and writing. The candidate must be able to communicate effectively and efficiently in oral and written form with all members of the health care team."

This, then, was the physical skill of communication that the respondent lacked. To possess that skill in the fullest degree, without substantial impairment, is one of the five critical physical qualifications for safe performance as a nurse member of a health care team. And it was the substantial impairment of this essential skill that convinced the District Court, after a full evidentiary hearing, that respondent could not safely perform in either her training program or her proposed RN profession. Nursing procedures performed by those not fully qualified in the above five physical senses pose constant and unforeseeable risks to the patients, to say nothing of posing potential legal risk for both the trainee nurse and those responsible for her train-

ing and supervision. See, generally, Murchison and Nichols, *Legal Foundations of Nursing Practice* 77-119 (1970); Challener, *The Rights, Liabilities and Duties of a Professional Nurse,* 54 Dick. L. Rev. 280 (1950).

The District Court's uncontested conclusion brings us back full circle to consideration of the public concern that safe nursing care be fostered and developed. Most certainly Section 504 should not be interpreted or applied in a manner that frustrates that public concern, particularly since Congress has given not the slightest indication that this concern should be ignored or challenged. Equally certain is the conclusion that the District Court, which was fully aware of this public concern, interpreted and applied Section 504 in a manner consistent with its language and its intent. In so doing, the District Court acted to protect and advance this overriding public concern. Its judgment should therefore be reinstated.

3. The confusion between clinical and academic programs

The confusion that seems to impregnate some of the language of Section 504 and some of the relevant H.E.W. regulations when applied to the facts of this case stems from one basic factor: Section 504 and the H.E.W. regulations are primarily if not exclusively structured to fit the problem of integrating the handicapped into the traditional academic educational programs. In those programs and activities, most handicaps have little if any relationship to qualifications and can constitute or generate no danger to the health or safety of others.

In other words, nothing in the statute or regulations seems designed to deal with the problems of the unqualified handicapped applicant who seeks admission to a federally funded program that deals directly with the health, the well being, the safety and even the life of those who are ill or injured. Congress did not deem it appropriate to focus here upon those problems in its formulation of the Section 504 principles. It obviously preferred to leave those problems, if they be problems, to the administrators of these public health type programs – the medical and the nursing programs – who are best equipped to understand and implement the public concern that only the most qualified be allowed to treat the sick and the infirm.

Indeed, Congress has consistently refrained from attempting to interfere with the administration and the curricula of federally funded programs and activities, like nurse training programs, that deal directly with the public health and with the training of those who serve and care for the ill. Thus in the Nurse Training Act of 1964, 78 Stat. 912, Congress took affirmative steps to encourage the flow of the able-bodied into the fields of nursing education and to improve and maintain the "high level of training demanded of the professional nurse."[7] It did so by providing for nursing school construction and project grants and for nursing student loan programs, hoping thereby to enable the schools to attract and train more qualified students to fill the critical national shortages in professional nursing personnel. And it did so on the express condition that, in executing this program, no department, agency or officer of the United States be authorized

[7] S. Rep. No. 1378, 88th Cong., 2d Sess. (1964), reprinted in [1964] U.S.Code Cong. & Admin. News 3669, 3672. That report also stated that the future supply of "trained nurses that will be needed if national health needs are to be met" must be drawn "from a much larger reservoir of able young women and men regardless of financial condition." *Ibid.*, 3673.

> ". . . to exercise any direction, supervision, or control over, or impose any requirement or condition with respect to, the personnel, curriculum, methods of instruction, or administration of any [nursing] institution." 42 U.S.C. §298a.

It would seem inconsistent with the spirit and the letter of the Nurse Training Act to so interpret or apply the provisions of Section 504 as to condition or alter the personnel, curriculum or methods of instruction in federally funded nursing schools in order to accommodate the needs and limited qualifications of the severely handicapped.

On the other hand, Congress is concerned about providing special educational opportunities at the postsecondary level for the deaf and other severely handicapped persons. But that concern is expressed outside the boundaries of the usual educational and training programs. Thus in the Education Amendments of 1974, 88 Stat. 584, 20 U.S.C. §1424a, Congress authorized a program of grants and contracts with institutions of higher education, junior and community colleges, and vocational and technical institutions

> ". . . for the development and operation of specially designed or modified programs of vocational, technical, postsecondary, or adult education for deaf or other handicapped persons. . . [who] by reason thereof require special education programming and related services."

Here again is an expression of a continuing concern by Congress that the regular vocational and clinical training programs for those who are truly qualified not be altered or modified to accommodate the severely handicapped students who need specially designed programming. And it would appear inconsistent with that legislative policy to interpret and apply

Section 504 so as to provide such special programming for the severely handicapped by means of the "affirmative accommodation" concept developed under Section 504.

In short, Congress simply has not used Section 504 as a means of addressing the unique problems of accommodating the postsecondary and clinical training programs to the educational needs of the severely handicapped. All that Section 504 was meant to accomplish was to open and to accommodate the academic-type postsecondary programs to the needs of those who are both handicapped and qualified. The confusion and difficulty come when an effort is made, as in this case, to superimpose the language of Section 504, and its implementing regulations, upon a specialized problem that Section 504 was not designed to handle. The initial problem of reading the words "otherwise qualified," for example, is created by the simple fact that Section 504 is being applied out of its narrow context of the qualified handicapped person making an application to an academic-type program where the handicap itself plays virtually no role in the assessment of qualifications. The very absurdity of the result reached by the Fourth Circuit in this case is proof that Section 504 does not literally apply under the facts of this case.

Given the inapplicability of Section 504 to this kind of postsecondary clinical training program, with all its public health implications, the result reached by the District Court is the only sensible one possible. Any other result would have frightening consequences to those highly skilled training programs that the public relies upon to supply the most able and safe medical and nursing care. Congress has given no indication that Section 504 is singularly designed to accomplish what various other Congressional statutes have studiously avoided – i.e., lower the physical qualification

standards of the nation's medical and nursing schools so as to provide some sort of modified training that can only produce and foster unsafe medical and nursing care. Something more than the ambiguities of Section 504 would be necessary before assuming that Congress intended to revolutionize and downgrade the quality of the nation's health care.

4. Private right of action under Section 504

Little need be added to the discussion already before this Court as to whether a private right of action may be implied from Section 504's silence on the matter. The 1978 Amendments to the Rehabilitation Act, which created the new Section 505, expressly recognized that a private suit can be brought under Section 504 only where the primary objective of funding the particular program or activity is to provide employment. See *Trageser v. Libbie Rehabilitation Center,* 590 F.2d 87 (4th Cir. 1978), petition for certiorari pending, No. 78-1454.

That being true, there no longer is any need to speculate as to whether any other kinds of private actions may be implied under Section 504. The careful delineation in Section 505 of the limited kinds of actions that may be brought removes any doubt that Congress did not and does not intend to authorize a private suit in a non-employment situation, as is here present. Pet. Br. 60-63.

Any suggestion that resolution of this private right of action problem may be avoided, by virtue of the fact that respondent grounded her suit in part on 42 U.S.C. §1983, is misplaced. There is some confusing language in the latter part of the District Court's opinion (Pet. App. 19a) that indicates that respondent "contends" that by violating Section

504, the College "has denied her rights guaranteed under the 'law of the United States,' thus giving rise to a cause of action under 42 U.S.C. §1983." But the procedural and jurisdictional history of this case contradicts that statement, and demonstrates that respondent never grounded her §1983 claim on an alleged violation of Section 504.

A more accurate accounting of the §1983 claim is contained in the opening paragraph of the District Court's opinion. Pet. App. 12a. That accounting shows that there were two quite separate jurisdictional bases for respondent's cause of action:

1. The allegation under §1983 that the College had denied respondent her constitutional rights to equal protection and due process by denying her admission to its nursing program. See also paragraph 13 of the complaint, App. 5a, and the pre-trial order dealing with respondent's jurisdictional contentions, App. 15a.

2. The separate allegation under Section 504 that the respondent was discriminated against by the College in denying her admission "because of a hearing disability." See also the pre-trial order, App. 15a.

The opinion of the Fourth Circuit correctly summarizes these two separate jurisdictional allegations. Pet. App. 3a. And that opinion further observes, correctly, that the §1983 claim of a constitutional violation was dismissed by the District Court, and was one of the issues raised on respondent's appeal. Pet. App. 3a. But since the Fourth Circuit disposed of the appeal on the basis of the non-constitutional claim under Section 504, it became unnecessary to dispose of the §1983 constitutional claim. Pet. App. 5a, fn. 4.

Thus the §1983 claim was at all times grounded solely on an alleged violation of the Fourteenth Amendment, not

upon an alleged violation of a law of the United States, i.e., Section 504. The Section 504 claim was at all times kept separate from the §1983 claim, and became the sole jurisdictional footing of the issues resolved by the Fourth Circuit. The question as to the viability of such a statutory claim remains before this Court.

It accordingly becomes unnecessary to address the jurisdictional enigma that might have ensued had the §1983 claim been based upon an alleged violation of Section 504. It is far from clear that a §1983 claim of a statutory violation can create a cause of action where the statute that has allegedly been violated itself creates no cause of action, or at least is silent on the matter.

CONCLUSION

The foregoing discussion augments petitioner's claim that the District Court's judgment should be reinstated.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472

Counsel for Petitioner

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Respondent.

BRIEF OF THE BOARD OF TRUSTEES OF PRINCE GEORGE'S COMMUNITY COLLEGE AS AMICUS CURIAE

DANIEL I. SHERRY
SHERRY, BOYER & NOLAN
Bowie Professional Building
3327 Superior Lane
Bowie, Maryland 20715
(301) 262-5200

Attorney to the Board of Trustees of Prince George's Community College

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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BRIEF OF THE BOARD OF TRUSTEES OF PRINCE GEORGE'S COMMUNITY COLLEGE AS AMICUS CURIAE

INTRODUCTION

The Board of Trustees of Prince George's Community College (the "Board") files this brief supporting the position of the Petitioner, Southeastern Community College, as *amicus curiae* pursuant to Rule 42, paragraph 2, the written consents of the parties having previously been submitted to the Clerk of this Court.

The Board is the duly appointed governing board of Prince George's Community College (the "College"), a public institution of higher education located in Prince George's County, Maryland.[1]

---

[1] See Annotated Code of Maryland, Education Article (1978 Ed.), Title 16, Subtitle 20.

The College offers a variety of programs of study, including an allied health program in nursing, which is the recipient of Federal financial assistance. The nursing department is approved by the Maryland State Board of Examiners of Nurses and is accredited by the National League of Nursing.

Graduates of the nursing program, a four-semester curriculum which is on record with and approved by the Maryland State Board of Examiners of Nurses, are eligible to sit for the Maryland State Licensing Examination for Registered Nurses.

To graduate from the nursing program, each student must successfully complete the nursing curriculum, which includes five required courses in Principles & Practices of Nursing, totalling 25 credit hours. These required nursing courses consist not only of classroom studies, but also include 6 hours of clinical practice each week during the first semester, and 12 hours of clinical practice each week during the second, third and fourth semesters.

This required clinical practice, which occurs at a number of affiliating hospitals in the Metropolitan Washington, D.C. area, involves the successful performance by each student of a wide variety of specific nursing tasks. These tasks respond to the actual nursing needs of the physically and mentally ill patients at the affiliating hospitals who are being cared for by the student. The tasks increase in complexity and in critical nature as the student progresses through the curriculum, while the extent of supervision decreases.

The purpose of these clinical practice courses is to train the student to meet the actual nursing situations which are encountered in practice by registered nurses. For this

reason, each student deals with maternity cases, infants, sick and disabled patients, the elderely, and the mentally ill; each student feeds, washes, clothes, and transports such patients, gives medications, including hypodermic and intravenous injections, dresses wounds, performs operating room and delivery room duties, participates in various medical and surgical procedures, and performs many other tasks which registered nurses are expected to be able to perform.

Like Southeastern Community College, the College has had a handicapped individual apply for admission to its nursing program, but unlike Frances B. Davis, this applicant does not suffer from hearing deficiencies, but is an epileptic whose condition is not controlled by medication.

By way of example, on April 5, 1978, while meeting with an advisor at the College, this applicant suffered a convulsive episode with no apparent warning, suddenly slid from a chair onto the floor, had muscular contractions, and was unconscious for several minutes.

There is no doubt that this applicant will be unable to perform the tasks required in the clinical practice courses of the College's nursing programs without unreasonable risk for the safety of the patients and the applicant.

THE INTEREST OF THE AMICUS CURIAE

The Board is interested in this case because the decision of the United States Court of Appeals for the Fourth Circuit which is being reviewed, if affirmed, will require the College to admit handicapped students to various programs without regard to the fact that certain handicaps are so disabling that the performance of required course work by a student with such a handicap will create an unreasonable risk to the safety of that student and other persons.

The circuit court below[2] determined that the district court erred in finding that Ms. Davis was not "otherwise qualified" pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, for admission to Southeastern Community College's nursing program, notwithstanding the determination, based on undisputed evidence, that Ms. Davis' hearing disability would prevent her from safely performing the required clinical training.

The Board is interested in this case because under the decision which is the subject of review, the College could not consider the episode of April 5, 1978 in determining whether to admit this applicant to its nursing program.

The Board is concerned about what would have happened happened on April 5, if this epileptic applicant, instead of being seated at her advisor's desk at the time of the seizure, had been holding a newly-born infant, or helping an elderly patient into a wheelchair, or giving an injection, or handing a scalpel to a surgeon in the operating room.

For these reasons, the Board of Trustees of Prince George's Community College files this brief in support of the brief of the Petitioner, Southeastern Community College, and urges that the decision of the United States Court of Appeals for the Fourth Circuit in *Davis v. Southeastern Community College*, 574 F.2d 1158 (CA 4, 1978), be reversed.

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[2] *Davis v. Southeastern Community College*, 574 F. 2d 1158, at 1160, 1161 (CA 4, 1978).

ARGUMENT

IN DECIDING WHETHER TO ADMIT A HANDICAPPED INDIVIDUAL TO A PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE, AN INSTITUTION OF HIGHER EDUCATION MAY CONSIDER THAT INDIVIDUAL'S ABILITY TO PERFORM SAFELY THE TASKS WHICH ARE ESSENTIAL TO PARTICIPATION IN THE PROGRAM OR ACTIVITY. FOR THIS REASON, THE INSTITUTION MAY DENY SUCH ADMISSION TO AN INDIVIDUAL WHOSE HANDICAP IS SO DISABLING THAT THE PERFORMANCE OR ATTEMPTED PERFORMANCE OF ESSENTIAL TASKS WILL CREATE AN UNREASONABLE RISK TO THE SAFETY OF THAT INDIVIDUAL AND OTHER PERSONS.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7 (6), shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 7(6) of the Act, 29 U.S.C. §706(6) provides, in pertinent parts:

> "The term 'handicapped individual' * * * means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

The district court, construing the statutory language of section 504, gave the words "otherwise qualified" their ordinary common meaning, and concluded,

> "Reasonably construed, these words qualify the passage [section 504] to mean that no person may be excluded from a federally-assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (DCNC, 1976).

Applying this construction, the district court determined that the Respondent Davis was not "otherwise qualified" because her handicap, "a severe impairment of her ability to hear," would prevent her from safely performing both her clinical nursing training and her proposed profession as a registered nurse. For this reason, the district court found that the Petitioner, Southeastern Community College, had not violated 29 U.S.C. §794 in denying Ms. Davis admission to its nursing program, and entered judgment in favor of the College.

On appeal, the circuit court rejected the "ordinary common meaning" definition given by the district court to the key statutory phrase "otherwise qualified", because while the appeal was pending, the Secretary of Health, Education and Welfare had promulgated implementing regulations, 45 C.F.R. Part 84, containing a definition of "otherwise qualified" which the circuit court construed precluded consideration of the nature of Ms. Davis' handicap in determining whether or not she was "otherwise qualified" for admission to the Petitioner's nursing program. *Davis v. Southeastern Community College*, 574 F. 2d 1158, at 1161, (CA 4, 1978).

The Board, as *amicus curiae*, contends that because Ms. Davis' handicap would prevent the safe performance of

her clinical nursing training, neither section 504 or the H.E.W. regulations (to the extent they may be found valid) precludes the College from considering her handicap and denying her admission to the nursing program.[3]

There is nothing in the Congressional declaration of purpose, Act, section 2, 29 U.S.C. §701, or in legislative history of the Rehabilitation Act to suggest that considerations of safety are to be ignored to permit handicapped individuals to participate in society.

> "The key to the intent of the bill is the Committee's belief that the basic vocational rehabilitation program must not only continue to serve more individuals, but must place more emphasis on rehabilitating individuals with more severe handicaps. It is the bill's intent to be more responsive to the needs of the handicapped individual by providing a better basic program of service as well as emphasis within special project authority for target populations whose needs are not now being met within the basic program. Additionally, the Committee has added provisions designed to focus research and training activities on making employment and participation in society more feasible for handicapped individuals." Senate Conference Report No. 93-318, Sept. 13, 1973; USCCA News, 1973, p. 2092.

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[3] The Board believes that the decision of the circuit court should be reversed because of Ms. Davis' inability to perform safely in her required clinical courses. For this reason, the questions of her being allowed to sit for the licensing exam or of her ultimate employment as a registered nurse are not within the scope of the interest of the *amicus curiae* in this case, and will not be considered in this brief.

On the contrary, the concern of Congress with considerations of safety is reflected in such enactments as the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.*, and in the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6001 *et seq.*, which require that programs for persons with developmental disabilities comply with "safety standards as may be promulgated by the Secretary." 42 U.S.C. §6010(3)(B)(vi).[4]

The Board submits that the district court correctly determined that Ms. Davis was not an "otherwise qualified handicapped individual" whose admission to the nursing program was mandated by section 504.

Further, the Board submits that the circuit court was in error in concluding that definitions of the implementing regulations mandated her admission.

Under these regulations, a

> "qualified handicapped person * * * (3) with respect to postsecondary and vocational education services, [is] a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 45 C.F.R. §84.3(k)(3).

Appendix A - "Analysis of Final Regulations", in discussing §84.3(k)(3), explains that "both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all non-

[4] An epileptic, such as the applicant about whom the Board is concerned, would be a person with a "developmental disability." 42 U.S.C. §6001(7).

academic admissions criteria that are essential to participation in the program in question." 42 Fed. Reg. at 22687.

The ability to perform with reasonable safety the tasks essential to participating in her clinical nursing courses was a "technical standard" which Mrs. Davis did not meet, if the phrase "technical standard" is to be given the meaning explained in the "Analysis". Such an interpretation is consistent with the district court's "ordinary common meaning definition" of the statutory "otherwise qualified."[5]

CONCLUSION

For the reasons stated above, the *amicus curiae*, the Board of Trustees of Prince George's Community College, respectfully urges that the decision of the circuit court should be reversed.

Respectfully submitted,

DANIEL I. SHERRY

SHERRY, BOYER & NOLAN
Bowie Professional Building
3327 Superior Lane
Bowie, Maryland 20715
(301) 262-5200

Attorney to the Board of Trustees of Prince George's Community College

[5] Representatives of the Policy Planning Office of the Office of Civil Rights, Department of Health, Education and Welfare, have advised the attorney for the *amicus curiae* on several occasions since September, 1978, most recently in January, 1979, that a policy interpretation document concerning the consideration which may be given to safety in admissions decisions is presently working its way through the agency. This is the result of a series of requests from the attorney to H.E.W., beginning in mid-1977.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE
Petitioner

v.

FRANCES B. DAVIS,
Respondent

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

SHELDON ELLIOT STEINBACH
Attorney for
The American Council on Education
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 833-4741

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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Interest of the American Council on Education

The American Council on Education (ACE) is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. It is a membership organization composed of 1,302 nonprofit institutions of higher education and 177 national and regional educational associations and organizations. One of the major functions of ACE is to serve as spokesman for colleges and universities on matters of national significance. As an organization whose members include the overwhelming majority of nonprofit four-year institutions of higher education, ACE is uniquely positioned to represent the interests of the higher education community on matters of national importance such as the issue pending before this Court.

Question Presented

The sole question presented in this case is whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, impliedly creates a private right of action, enabling individual claimants to bring civil actions under the statute against colleges and universities which receive federal financial assistance.

ARGUMENT

I. THERE IS NO PRIVATE RIGHT OF ACTION PROVIDED UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. SECTION 794, WHERE CONGRESS HAS ENTRUSTED INTERPRETATION AND ENFORCEMENT OF THE STATUTE TO AN EXECUTIVE AGENCY AND PLAINTIFF HAS FAILED TO AVAIL HIMSELF OF THE ENFORCEMENT PROVISIONS PROMULGATED BY THE AGENCY.

A. *The application of standards enunciated in* Cort v. Ash *leads to the clear conclusion that there is no private right of action under Section 504 of the Rehabilitation Act of 1973.*

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 provides:

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Although the Rehabilitation Act of 1973 provides a comprehensive scheme for vocational rehabilitation and other services for the handicapped, it does not necessarily follow that plaintiff is entitled to enforce the regulations in an individual action against a college in Federal court. On the contrary, the statute itself confers no such right of action and an analysis of the legislative history and the overall statutory and regulatory framework concerning the rights of handicapped reveals that Congress neither intended nor does sound policy require a private right of action such as plaintiff seeks to assert here.

Section 504 on its face does not confer upon plaintiff the right to enforce its provisions in an individual action. In the absence of explicit Congressional conferral of a private right of action, it is only under certain carefully circumscribed circumstances that Courts will imply such a right.

Cort v. Ash, 422 U.S. 66 (1975) (refusing to imply a private right of action by a shareholder under 18 U.S.C. Section 610, forbidding corporate contributions to presidential campaigns); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (refusing to imply a private right of action by an investor under the Securities Investor Protection Act of 1970, 15 U.S.C. Section 78aaa, *et seq.*); *National Railroad Passenger Corp. [Amtrak] v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) (refusing to imply a private right of action to enforce Rail Passenger Service Act of 1970, 45 U.S.C. Section 501 *et seq.*).

The four factors identified by the Supreme Court in deciding whether a private remedy is implicit in a statute not expressly providing such a remedy were set forth in *Cort v. Ash*, *supra:*

> "First, is the plaintiff 'one of the class for whose especial benefit the statute was created,'—that is, does the statute create a Federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a right or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law?"
> 422 U.S. at 78 (citations omitted).

1. Is the plaintiff one of the class for whose especial benefit the statute was enacted?

Although not all handicapped individuals are entitled to the protection of Section 504 of the Act and the burden rests upon the plaintiff to demonstrate that he is an "otherwise qualified handicapped individual" *amicus* wishes to concede *arguendo* that plaintiff herein falls within the category of individuals for whose benefit the statute was enacted.

2. Is there any indication of legislative intent explicit or implicit, either to create such a remedy or to deny one?

The legislative history of 29 U.S.C. Section 794, which was enacted in 1973, contains no mention, either explicit or implicit, that Section 794 was intended to create a private right of action. The only mention of the section in the Senate and conference reports merely tracks the language of the section. *See* 2 U.S. Code Cong. & Admin. News, pp. 2123, 2143 (1973). Nor has counsel been able to find any reference to the section in the Congressional debate on the bill. There being no indication from the language of the statute or from the legislative history preceding its enactment that Congress intended to confer a private right of action to enforce 29 U.S.C. Section 794, no such right should be inferred. *Securities Investor Protection Corp. v. Barbour, supra; Amtrak v. National Ass'n of Railroad Passengers, supra; People's Housing Development Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976).

In 1974 Congress amended certain portions of the 1973 Act, although Section 794 was not among them. Nonetheless, the report of the Senate Labor and Public Welfare Committee indicates the enforcement provisions which the Senate apparently had in mind in passing Section 794 a year earlier:

> "The language of Section 504, in followig (sic) the above-cited Acts [Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d (1973) and Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 (1973)] further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of Section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurance of compliance with Section 504. *This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provision, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency with the Federal government* as well as relative case of implementation, and permit a judicial remedy through a private action." (Emphasis supplied.)
> S. Rep. 1297, 93d Cong., 2d Sess., reprinted in [1975] U.S. Code Cong., & Adm. News 6373, 6390-91.

It is clear from the context that the judicial remedy referred to in the report is a judicial review of an administrative enforcement proceeding, and not an independent action by a private plaintiff which effectively would bypass the elaborate administrative mechanism contemplated by Congress and promulgated by HEW.

The two statutes referred to in the Senate report, Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d-2 (1973) and Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 *et seq.* (1973) constitute the *model* for drafting 29 U.S.C. Section 794.

In considering whether or not the legislative intent was to create a private cause of action under Section 504; therefore, it is helpful to look at the cases discussing the private cause of action under Title VI and Title IX in light of the fact that these were the "models" for Section 504.

While the *Lau v. Nichols* opinion found at 414 U.S. 563 (1974) is sometimes cited for the proposition that the

Supreme Court recognized a private cause of action under Title VI, an examination of that case reveals that when it was first brought before the Court, it included allegations of violation of the Fourteenth Amendment and §1983. While the Supreme Court chose to depend upon the statutory basis in Title VI for their opinion rather than the Fourteenth Amendment, they did not actually discuss the issue of whether or not there was a private cause of action under Title VI. See Justice White's footnote discussing that issue in footnote 1 at page 2794 *Regents of the University of California v. Allan Bakke*, 98 S. Ct. 2733 (1978)).

Similarly, in deciding the *Bakke* case, *supra*, the Supreme Court did not hold there was a private cause of action under Title VI. Indeed, Justice White was so disturbed with this lack of decision on the jurisdictional basis, he wrote a separate opinion to set forth his view that Title VI could not and did not create a private cause of action (at pp. 2794-2798). Four other Justices apparently felt the *Bakke* case did not require a decision as to whether or not a private cause of action was available under Title VI. (See pp. 2766 and 2794.)

Similarly, with respect to Title IX, the Seventh Circuit has held that there is no private cause of action available to individuals in the case of *Cannon v. University of Chicago*, 559 F. 2d 1063 (7th Cir., 1977) *cert granted* 98 S. Ct. 3142 (1978) where that court held that there was no private cause of action under Title IX and recognized the principle enunciated in *National Railroad Passenger Corporation, supra*, that where there is no specific private cause of action granted by a statute, the courts should not expand it to provide one.

In summary, it appears evident that the legislature neither intended nor provided a private cause of action under Section 504 of the Rehabilitation Act of 1973, but rather intended that the judicial review under such Act

follow the procedures set forth in the legislative scheme for enforcement discussed below.

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

To allow plaintiff to maintain the instant action would do violence to the elaborate mechanism which HEW now has promulgated and which provides a comprehensive administrative framework, including procedures for compliance reports, compliance review, complaints by victims of alleged discrimination, investigation of the complaint, resolution of the complaint by informal and voluntary means, and, finally, termination by HEW of financial assistance upon non-compliance by the recipient institution. 45 C.F.R. Sections 80.6-10-10 and 45 C.F.R. 81.1 *et seq.* (1975), made applicable to Section 794 violations by 45 C.F.R. Section 84.61, 42 Fed. Reg. 22685 (May 3, 1977). Thus, HEW has an adequate mechanism to enforce 29 U.S.C. Section 794 and there is no reason for this court to assume that it would not be applied in an appropriate case. The granting of a private right of action to plaintiff in this case would upset the above-described procedural framework and would foster a piecemeal solution to a problem that clearly was intended to be solved by an administrative agency in a uniform manner.[1]

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[1]That Congress intended a uniform national approach to Section 794 enforcement, and that such enforcement should be carried out by HEW is apparent from the legislative history of the 1974 amendments to the Rehabilitation Act, 1973.

> "It is intended that Sections 503 and 504 [29 U.S.C. Sections 793, 794] be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education,

The administrative enforcement mechanism described above, contemplated by Congress and promulgated by HEW, was in effect when this suit was initiated. Yet plaintiff seeks to bypass the procedure and substitute a Federal court for the legislatively selected administrative forum. As the Supreme Court stated in the *Amtrak* case:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to prescribe other remedies."
> 414 U.S. 453, 458 (1974).

In the instant case, Congress has provided, through HEW, a remedy for the violation of rights which plaintiff alleges. This court is not required to take upon itself the responsibility that Congress has placed with HEW.

The above analysis concerning the limited scope of judicial monitoring of the enforcement of 29 U.S.C. Section 794 is consistent with the Seventh Circuit Court of Appeals in *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (1977), where a class action was brought under Section 794 seeking relief from the defendant's contemplated purchase of busses which would be inaccessible to persons in plaintiffs' class who are confined to a wheelchair or otherwise "mobility-disabled." The court held that Section 794 implied a right to bring a class action to enforce Section 794 in absence *of administrative procedures or regulations to enforce the section*. It is important

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and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the Section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of Sections 503 and 504."

to note, first, that plaintiff in this suit has not brought a class action, so the case is immediately distinguishable from *Lloyd*. More important, however, *Lloyd* was decided before HEW promulgated the enforcement regulations at issue in this action. In reviewing the legislative history of Section 794, and explicitly referring to the report, cited above, of the Senate Labor and Public Welfare Committee, the court stated:

> "While the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in the Federal court, still it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the Federal courts." 548 F. 2d at 1286.

And in a footnote to the above statement, the court said:

> "[A]ssuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to *a posteriori* judicial review."
> 548 F. 2d 1286, n. 29.

The enforcement provisions of 45 C.F.R. Section 84.61 are neither inadequate nor meaningless. The regulations promulgated by the Secretary of Health, Education, and Welfare, did not become effective until June 3, 1977. The lapse in time between enactment of the statute and the effective date of the regulations has given rise to considerable confusion as to whether a private right of action exists under the statute. The court in *Lloyd* recognized that it was "premature" to determine the question of a private right of action in the absence of a consolidated procedural enforcement regulation. We contend that the promulgation of regulations for Section 504 in 1977 limits any present judicial remedy to postadministrative review.

Thus, this court is presented with a question not decided by *Lloyd*—whether, where the administrative agency has promulgated regulations providing for the enforcement of Section 794, a plaintiff should be allowed to bypass those procedures and sue directly in Federal court.

The Fourth Circuit also found a private cause of action in *Davis v. Southeastern Community College*, 574 F. 2d 1158 (4th Cir., 1978), based upon *Lloyd, supra.* Interestingly, the *Davis* Court also cited the opinion granting a preliminary injunction in *Barnes v. Converse College*, 436 F. Supp. 635, 638 (D.S.C., 1977) as supporting the holding that there was a private cause of action under Section 504. The cause of action in *Barnes* was also initiated prior to implementation of HEW Regs. under Section 504 as were the suits in *Davis* and *Lloyd.* Subsequently the *Barnes* court held that there was no cause of action available until after the exhaustion of administrative remedies, and on a motion for reconsideration of that opinion based upon *Davis*, the District Court in *Barnes* indicated that the *Davis* opinion resulted from a case in which the action was initiated prior to the implementation of the HEW regs. and therefore stood only for the proposition that the "in-house" administrative procedures developed prior to the HEW Regs. need not be exhausted. The Court pointed out that in a footnote, the *Davis* court had specifically advised the lower court that it might consider whether the newly promulgated HEW Regulation's remedies had to be exhausted prior to the commencement of an action in Federal court.

Inasmuch as the legislative history evinces an intent to provide only for judicial review of administrative determinations, and no intent to provide for direct judicial review of a complainant's claim, and in light of well-established principles of exhaustion of administrative remedies and the doctrine of primary jurisdiction, a private right of action should not be implied.

4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on Federal law?

The fourth *Cort* criterion counsels restraint in interfering with state regulation *Rogers v. Frito-Lay, Inc.*, 433, F. Supp. 200, 203 (N.D. Tx., 1977). A recent survey reveals that thirty-five states, the District of Columbia, and New York City now have statutes that prohibit discrimination against the handicapped. Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L.J. 65, 65 n. 1 (1977). Therefore, "[a]n applied Federal private right of action might . . . duplicate available state remedies and substantially increase the possibility of inconsistent judgments by Federal courts, Federal administrative agencies, state courts, and state administrative agencies." *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. at 203. Accordingly, because discrimination against qualified handicapped individuals is already protected by state law, it would hardly be appropriate to infer "a cause of action based *solely* on Federal law." *Cort v. Ash* 422 U.S. at 78. (emphasis supplied)

B. *The Rehabilitation, Comprehensive Services and Development Disabilities Act of 1978, P.L. 95-602 does not grant a private right of action under Section 504.*

Section 505 (a) (1) of P.L. 95-602 provides that the rights, remedies and procedures available under Section 504 shall be co-extensive with those available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d).

Justice White in the *Bakke* decision explored in great depth the entire issue of whether there was a private cause of action under Title VI of the Civil Rights Act of 1964. After noting that four Justices are "apparently" of the view that a private right of action exists and four Justices assume it for purposes of the case, he persuasively demon-

strates that there is indeed no private right of action under Title VI.

> "A private cause of action under Title VI would, in terms both of the Civil Rights Act as a whole and that title, not be 'consistent with the underlying purposes of the legislative scheme' and contrary to the legislative intent. *Cort v. Ash*, 422 U.S. 66, 78 (1975). Title II, 42 U.S.C. §2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U.S.C. §2000e *et seq.*, dealing with employment, proscribe private discriminatory conduct that as of 1964 neither the Constitution nor other Federal statutes had been construed to forbid. Both titles carefully provided for private actions as well as for official participation in enforcement. . . .
>
> The role of Title VI was to terminate Federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, 42 U.S.C. §2000d, imposed the proscription that no person, on the grounds of race, color or national origin, was to be excluded from or discriminated against under any program or activity receiving Federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other titles or the Act, intended silently to create a private cause of action to enforce Title VI. . . .
>
> Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted (footnote omitted). To allow a private individual to sue to cut off funds under Title VI would compromise these assurances and short circuit the procedural preconditions provided in Title VI. . . .
>
> A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cut-off or of stopping discriminating would not permit private parties to pose precisely the same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.
>
> Significantly, in at least three instances legislators who played a major role in the passage of Title VI explicitly stated that a private right of action under Title VI does not exist. As an 'indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one,' *Cort v. Ash*, 422, U.S. 66, 78 (1975), clearer statements cannot be imagined, and under *Cort*, 'an explicit purpose to deny such cause of action [is] controlling.' Id., at 82. Senator Keating, for example, proposed a private 'right to sue' for the 'person suffering from discrimination'; but the Department of Justice refused to include it, and the Senator acquiesced (footnote omitted). These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as Mr. Justice Stevens and the three Justices who join his opinion apparently would. See n. 26 of the opinion of Mr. Justice Stevens. . . .
>
> [Justice White concludes that] This Court has always required 'that the inference of such a private cause of action not otherwise authorized by statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). See also *Securities Investors Protection Corp. v. Barbour*, 421 U.S. 412, 418-420 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test." (98 S. Ct. 2733, 2795-97)

It is our contention that an examination of recent legislative action amending another, similarly structured, civil

rights statute demonstrates that Congress is well aware of the enforcement issue and that it could have amended Section 504 expressly to create a private right of action had that been its intention.

The Age Discrimination Act of 1975, 42 U.S.C. §§1601 *et seq.*, prohibits discrimination on the basis of age in federally assisted programs and activities. The Act's operative section (§303, 42 U.S.C. §6103) is worded similarly to that of Title IX:

> "No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In its original form, the Act dealt with the enforcement question by stating, "The provisions of this section shall be the exclusive remedy for the enforcement of the provisions of this title." §305(e), 42 U.S.C. §6105(e). In 1978, however, Congress voted to delete §305(e) and to substitute two new subsections expressly recognizing a private right of action.[2] The report of the Committee on Education

[2](e)(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this Act by any program or activity receiving Federal financial assistance, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health, Education, and Welfare, the Attorney General of the United States, and the person against whom the action is directed. Such interested person may elect, by demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing plaintiff.

(2) The notice referred to in paragraph (1) shall state the nature of the alleged violation, the relief to be requested, the court in which the action will be brought, and whether or not attorney's fees are being demanded in the event that the plaintiff prevails. No action described in paragraph (1) shall be brought (A) if at the time the action is brought the same alleged violation by the same defendant is the subject of a pending action in any court of the United States; or (B) if administrative remedies have not been exhausted.

and Labor, in a section entitled "Private Right of Action to Enforce Act," stated that it was the purpose of the House's version of the new provision "to provide that any interested person may bring an action in an appropriate district court of the United States to enjoin any violation of such act by any program or activity receiving Federal financial assistance." H.R. Rep. No. 1150, 95th Cong., 2d Sess. 40 (1978). The Senate version of the bill did not address this issue, S. Rep. No. 855, 95th Cong., 2d Sess. (1978), and the conference agreement accepted the House version, with certain modifications. See Conference Report H.R. Rep. No. 1618, 95th Cong., 2d Sess. 87 (1978).

Thus, Congress in 1978 demonstrated its awareness of the issues surrounding the authorization of a private right of action under a civil rights statute enacted some years previously, and it resolved the question through appropriate statutory language. In the case at bar, Congress in 1978 just gave individuals under Section 504 judicial review of an administrative enforcement proceeding and not an independent action by a private plaintiff which would bypass the elaborate mechanism contemplated by Congress and enacted by HEW.

(f) With respect to actions brought for relief based on an alleged violation of the provisions of this title, administrative remedies shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance, whichever occurs first. [Reprinted in Conference Report, H.R. Rep. No. 1618, 95th Cong., 2d Sess. 47 (1978).]

C. *The existing administrative remedies must be exhausted.*

In view of the now existing procedure implementing Section 504 and providing measures for remedial relief this Court should invoke the well-established rule of judicial administration that a litigant is not entitled to judicial relief until the prescribed administrative remedy has been exhausted. *McKart v. United States*, 395 U.S. 185 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); K. Davis, *Administrative Law of the Seventies*, §20.01 at 446 (1976). This doctrine is founded upon reasons soundly summarized in the *Mayor and City Council of Baltimore v. Mathews*, 562 F. 2d 1914 (4th Cir., 1977):

> "The doctrine of exhaustion has long been part of Federal jurisprudence, and is grounded upon a variety of reasons: respect for 'administrative autonomy'; a desire that administrative 'expertise and discretion' should first be brought to bear upon specialized problems; and conservation of judicial energies and resources." 562 F. 2d at 920 n. 2 (citation omitted).

Recognizing this principle, a recent decision has held that a plaintiff may not bring a private action under Section 504 of the Act without first exhausting the new HEW administrative remedies that were designed to investigate complaints of discrimination. *Doe v. New York University*, 422 F. Supp. 522 (S.D.N.Y., 1978). The plaintiff in *Doe*, a prior student at a medical school who had taken a leave of absence because of "substantial mental instability," was seeking readmission. After an investigation by the court in *Doe* revealed that the Office for Civil Rights was processing individual complaints of discrimination, the court concluded:

> "On paper, it now appears that, in the words of the Seventh Circuit in *Lloyd, supra*, 'meaningful administrative enforcement' is available for complaints under Section 504. HEW must be given at least the opportunity to develop an efficient and sensitive mechanism to deal with complaints of discrimination brought by handicapped persons before a court can make a reasoned evaluation of such a mechanism's adequacy. Especially in the context of a relatively new and broadly-worded statute like the one in question here, which could flood the courts with new litigation, administrative interpretation and guidance may be an important element in the developing construction and application of the law . . . Further, it is not unreasonable to conclude that HEW could bring a greater degree of flexibility and expertise to bear on these issues." 422 F. Supp. at 523-24.

Another decision, *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C., 1977), has also held that the "exhaustion of administrative remedies" doctrine is appropriate for grievances under Section 504 of the Act. In *Crawford*, the plaintiff was a deaf-handicapped graduate student who claimed the university failed to provide him with interpreter services. The Court in *Crawford* concluded that under the HEW regulations "any person believing himself to be the object of discrimination can file a complaint (45 C.F.R. §80.7). An investigation can be commenced and a hearing may be obtained. While a complainant may not be a party to the proceeding, he can petition to become involved in the controversy as *amicus curiae*. (45 C.F.R. §81.23)" 440 F. Supp. at 1058. See *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C., 1977).

II. IN A DECISION WHETHER TO IMPLY A PRIVATE RIGHT OF ACTION UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, WEIGHT SHOULD BE GIVEN TO THE COUNTERVAILING CONSTITUTIONAL INTEREST IN ACADEMIC FREEDOM.

To the extent that this Court looks outside Section 504 and its legislative history for guidance in determining whether to imply a private right of action under Section 504, the well-established constitutional interest in academic freedom should not be overlooked. "Academic freedom" in the traditional sense has been defined[3] as follows:

> "Academic freedom is the freedom of the teacher within his or her field of study. It is a safeguard that allows researchers and teachers in institutions of higher learning to pursue their work without the inhibition, prohibition, or direction of political, ecclesiastical, or other administrative authorities, regardless of their personal philosophies, behavior, or life-style. It is a liberty granted to these individuals to assure them the opportunity for examination and challenge of doctrines, dogma, and received opinions in the interest of advancing knowledge for the benefit of all society."

Academic freedom has long been a major tenet of our American democratic faith. It, like other such tenets, is embedded in our constitutional law. Academic freedom has been construed to encompass a variety of elements: freedom to provide instruction in a foreign language (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); freedom to express unpopular political beliefs in the classroom (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)); freedom to refuse to take a loyalty oath (*Keyishian v. Board*

[3] "Academic Freedom," entry in Knowles, ed., *The International Encyclopedia of Higher Education* (San Francisco: Jossey-Bass, 1977), Vol. 2A, p. 24.

of Regents, 385 U.S. 589 (1966)); freedom to teach religiously unorthodox scientific theories (*Epperson v. Arkansas*, 393 U.S. 97 (1968)); and freedom of students to organize an education-related extracurricular activity (*Healy v. James*, 408 U.S. 169 (1972)).

Academic freedom in its purest sense must be grounded in the freedom of academic institutions to fulfill their missions of teaching, research and service in an environment free of governmental interference with matters of educational policy. Justice Frankfurter acknowledged this necessity when he described "the four essential freedoms" of a university as "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire, supra*, at 263.

In its recently completed term, the U.S. Supreme Court decided two cases, which reaffirm the constitutional interest in academic freedom under the First Amendment and the due process clause of the Fourteenth Amendment. In *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), the due process clause was held not to require a formal hearing in cases of dismissal on academic grounds. And, in *University of California Regents v. Bakke, supra*, Justice Powell in finding the attainment of a diverse student body a constitutionally permissible goal under the equal protection clause, looked to the First Amendment's well-established concern for academic freedom. The Court's discussion in those cases of the appropriateness of judicial deference to educators on educational matters are of direct relevance to the question presented in the instant case.

In *Horowitz*, a student in her final year of medical school at a state university was dismissed for failure to meet required academic standards with respect to clinical practice. She brought suit under the Civil Rights Act of

1871, 42 U.S.C. §1983, alleging that the school's failure to grant her a hearing prior to her dismissal violated her rights under the due process clause of the Fourteenth Amendment. In holding that a formal hearing was not required under the circumstances of the case, the Court distinguished between dismissals for disciplinary cause, *Goss v. Lopez*, 419 U.S. 565 (1975), and dismissals for academic cause:

> The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions present in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, *the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.* (emphasis added) 435 U.S. 78, 89-90.

In his concurring opinion, Justice Powell made a similar point: "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." Id. at 96 n. 6.

Amicus submits that academic judgments concerning admission, evaluation, and dismissal are ideally within the sole purview of university faculties. Nevertheless, it is recognized that an individual's civil rights (including the right to be free of discrimination on the basis of handicap) are of a dignity to require that academic decisions affecting those rights be reviewable. Such review, however, must be limited to assuring that decisions are based on academic considerations, and not on capricious, academically irrelevant, or morally and legally reprehensible grounds. This limited constraint on academic autonomy can be effected

least intrusively and least dangerously by entrusting enforcement of the law to an administrative agency which has expertise in educational matters, with a mandate that efforts to achieve voluntary compliance precede any formal enforcement proceedings. This is precisely what Congress has done in establishing the enforcement scheme for Section 504, which should not now be supplemented by private civil actions.

In warning against "judicial intrusion into academic decisionmaking," the majority opinion in *Horowitz* stated, "Courts are particularly ill-equipped to evaluate academic performance . . . We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship." Id. at 90. Since Section 504 was primarily, if not exclusively, intended to ensure nondiscrimination on the basis of handicap among beneficiaries of federally-assisted educational programs and activities, students and applicants for admission are the principal parties protected by the statute. If a private right of action is implied under Section 504, many of the cases which will have to be decided by the Federal courts will involve academic evaluations. This would portend precisely the situation the Court was seeking to avoid in *Horowitz*.

In *University of California Regents v. Bakke, supra*, which was an action brought by an unsuccessful applicant to a state university medical school who alleged that he had been the victim of discrimination on the basis of race in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. In finding that the attainment of a diverse student body is a constitutionally permissible goal under the equal protection clause, Justice Powell looked to the First Amendment's concern for academic freedom:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special

> concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. (98 S. Ct. 2733, 2753)

Justice Powell went on to state that, although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. And, in *Bakke*, the university's medical school admissions system was found to have exceeded those constitutional limitations.

In the present case, statutory rather than constitutional limitations protecting individual rights may not be disregarded. *Amicus* is not urging that statutory limitations be disregarded, but rather that, in defining and interpreting those limitations, the Court be mindful of the countervailing constitutional interest in the integrity of the academic enterprise.

III. Broad policy considerations do not favor implication of a private right of action under Section 504.

If this Court finds it necessary to look beyond Section 504, its limited legislative history, the legislative histories of related statutes, and constitutional principles in order to decide whether a private right of action should be implied under Section 504, broad considerations of public policy requires that no such right be implied.

A. *Private actions would result in differing, and possibly inconsistent, interpretations of Section 504 and the regulations promulgated thereunder.*

Section 504's operative section consists of a single sentence mandating nondiscrimination on the basis of handicap in federally-assisted educational programs and activities, with certain delineated exceptions. Regulations promulgated under Section 504 cover all aspects of a university's operations, including admissions, financial aid, housing, athletic programs, and employment. Enforcement of the regulations has been entrusted to the Department of Health, Education, and Welfare's Office for Civil Rights (OCR).

The Section 504 regulations do not contain rigid formulas as to what constitutes compliance. Rather, they are imbued with the notion of reasonableness throughout. By taking such an approach, HEW is able to maintain substantial discretion and flexibility in enforcing Section 504. If, however, a private right of action is implied, and individual complainants are permitted to bypass OCR's administrative enforcement procedures, differing views of what is "reasonable" can be expected, and there will be little hope for that uniformity of interpretation which all agree is desirable.

B. *The Department of Health, Education, and Welfare has greater expertise in handling complex educational matters than the Federal judiciary.*

Amicus believes that any policing of the process necessary to ensure equal educational opportunity can best be performed by an executive department staffed with experienced professionals who are familiar with the operation of institutions of higher education. The Seventh Circuit in *Cannon* addressing the issue of a private right of action correctly noted this underlying rationale for the doctrine of primary jurisdiction and concluded: "In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition, HEW has the benefit of comparing the local practice to the admission policies on a national level." 559 F. 2d 1063 at n. 17.

Declining to imply a private right of action couples the advantage of relying on HEW's greater expertise in

educational matters with the concomitant and not inconsequential benefit of conserving the resources and energy of the judiciary. As the court in *Cannon* stated, "Considering our already overburdened system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accommodate." 559 F. 2d 1063, 1075.

C. *Excessive litigation would constitute a drain on the resources of hard-pressed colleges and universities.*

It has been urged that, because HEW's Office for Civil Rights has been unable to keep current in its processing of Section 504 complaints, a private right of action should be implied to enable individual complainants to sue educational institutions which allegedly have not complied with the Section 504 regulations. Failure of a governmental agency to carry out its charge, however, should be of no relevance in ascertaining whether Congress intended for colleges and universities to be subject to civil actions brought by private individuals to enforce Section 504.

Implication of a private right of action under Section 504 could result in a host of new lawsuits against colleges and universities. Under such circumstances the potential for litigation over admissions and employment decisions and academic evaluations would be virtually limitless. The consequence could be a serious depletion of the resources of educational institutions, resources which might better be used in meeting educational objectives. As one university president recently wrote in the alumni magazine of the Massachusetts Institute of Technology:[4]

> Aside from the merits of any particular case, the overriding fact is clear that the hands of all administrators are

[4]Bennis, *Where Have All the Leaders Gone?* 79 TECHNOLOGY REV. 5 (March/April, 1977).

> increasingly tied by real or potential legal issues. I find I must consult our lawyers over even small, trivial decisions. The university has so many suits against it (40 at last count) that my mother now calls me, "My son, the defendant."
>
> The Courts and the law are, of course, necessary to protect individual rights and to provide recourse for negligence, breach of contract, and fraud. But a "litigious society" presents consequences that nobody bargained for, not least the rising, visible expense of legal preparation plus the invisible costs of wasted time.

A private right of action should not be implied under Section 504 in the absence of a Congressional finding that it is in the national interest for colleges and universities, to expend increasing shares of their limited resources for litigation costs.

Conclusion

This case raises a Federal question of nationwide importance that requires prompt resolution, specifically, whether Section 504 impliedly creates a private right of action and, if so, whether an individual must exhaust his or her administrative remedies available under the Act and the HEW regulations. Unlike any prior case of this Court, never has so much been implied in a statute from so little. Section 504 and the implementing regulations do not expressly authorize a private right of action. The legislative history is silent. The statute envisions and the regulations provide an elaborate administrative mechanism which can ensure remedial relief for individuals. And the threat of a cutoff of Federal assistance guarantees swift enforcement of the statutory prohibition.

Therefore, *amicus curiae* urges that this court mandate the plaintiff herein exhaust the administrative remedies

available to her. In addition to the above considerations involving the clear intent of Congress, there are further policy considerations militating against implying a private right of action for handicapped persons where none existed prior to the passage of Section 794 and where Congress has not defined the scope of such a right of action. Under such circumstances, the courts will be forced to fix a statute of limitations, standards relating to venue, defenses available and remedies awardable under the new right of action. These questions likely will be answered in different ways by different courts. The more sensible approach it would seem is to leave interpretation and enforcement of the statute in the hands of HEW, with the courts being available for judicial review of agency determinations.

In summary, neither 29 U.S.C. Section 794 nor the legislative history underlying its enactment give any indication that Congress intended to confer upon an individual who has not availed himself of the administrative enforcement provisions the right to maintain a private enforcement action in the Federal courts. To hold otherwise would undermine the overall regulatory scheme for enforcing the Act and would unnecessarily add to the workload of an already overburdened Federal court system.

Respectfully submitted,

SHELDON ELLIOT STEINBACH
American Council on Education
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 833-4738

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In the Supreme Court of the United States

October Term, 1978
No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner

v.

FRANCES B. DAVIS,
Respondent

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

ROBERT E. RAINE
Deputy Attorney General
ALLEN C. WARSHAW
Deputy Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Director, Office of Civil Law
EDWARD G. BIESTER, JR.
Attorney General
Pennsylvania Department of Justice
Capitol Annex Building
Harrisburg, Pennsylvania 17120
Telephone (717) 787-5022

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

The Commonwealth of Pennsylvania has been a pioneer in recognizing the legitimate grievances of handicapped persons. As early as 1971, the State entered into the first consent agreement guaranteeing mentally retarded children a free public education.

Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971). This landmark agreement became the prototype for subsequent court decisions, the Education for All Handicapped Children Act of 1975, P.L. 94-142, and Subpart D of the regulations promulgated by the Department of Health, Education and Welfare (HEW) implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Thus, Pennsylvania has demonstrated a substantial interest in ensuring the provision of equal rights to the handicapped.

Moreover, Pennsylvania is deeply interested in the logical and effective enforcement of Section 504 from a variety of additional, but different perspectives.

Specifically, as parens patriae of the citizens of Pennsylvania, the Commonwealth is concerned that those of its citizens who suffer from handicaps do not additionally suffer discrimination from either their government or those who receive federal tax dollars in the form of grants. As an employer and provider of services, the Commonwealth is concerned that the rules governing its handling of handicapped employees and applicants are precise and, in addition, that they are logically and uniformly enforced. As a recipient and conduit of federal funds, the Commonwealth is, of course, concerned that the continued receipt of those funds is not unjustly impaired because of alleged violations of Section 504 and that procedures for instituting the cut-off of such funds are clearly delineated. Naturally, the Commonwealth is concerned that the tax dollars of its citizens are

not wasted in needlessly defending multiple actions alleging discrimination against a handicapped person brought in various administrative forums and in court. Finally, the Commonwealth must be concerned that Section 504 is not implemented in such a way that handicapped individuals are placed in situations where they are dangerous either to themselves or to other citizens of the Commonwealth.

With all of these concerns in mind, the Commonwealth seeks briefly to explain to the Court the impact that the decision of the Fourth Circuit Court of Appeals in *Davis v. Southeastern Community College,* 574 F.2d 1158 (1978), would have upon the Commonwealth and to urge reversal of that decision.

ARGUMENT

I. The Circuit Court's construction of the definition of "otherwise qualified handicapped individual" contravenes Section 504 of the Rehabilitation Act of 1973 and the implementing HEW regulations.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, states:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

It is the position of the Commonwealth of Pennsylvania that the federal courts are ill suited to be the initial forum to determine whether an individual handicapped person is or is not qualified to participate in a certain program or employment. This sort of sensitive factual issue should be determined first by the agency to which the handicapped person is applying and, if challenged, should thereafter be reviewed by the Department of Health, Education and Welfare.

Should Section 504 give rise to a private cause of action in federal court, it will be the court's role to

ultimately determine factual questions of this kind. The Commonwealth submits that the test used to determine this issue by the Fourth Circuit Court of Appeals is illogical, is at variance with the HEW regulations and would lead to absurd and harmful results for all concerned. The Commonwealth, therefore, joins petitioners in requesting that that test be struck down by this Court.

In this regard, the district court below ruled that an otherwise qualified handicapped person must "be otherwise able to function sufficiently in the position in spite of her handicap, if proper training facilities were suitable and available." *Davis v. Southeastern Community College,* 424 F. Supp. 1341, 1345 (E.D. N.C. 1976). The Circuit Court held this definition to be inconsistent with HEW's Section 504 regulations specifically 45 C.F.R. §84.3(k)(3) which contains the following definition of a "qualified handicapped person":

> With respect to post-secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's educational program or activity. *Davis v. Southeastern Community College,* 574 F.2d 1158, 1161 (1978).

The Fourth Circuit went on to quote from the official Analysis provided by HEW for this definition which indicates that:

> Both academic and technical standards must be met by applicants to these programs. The

term "technical standard" refers to all non-academic admissions criteria that are essential to participation in the program in question. *Supra* at 1161.

The Fourth Circuit proceeded to hold:

> The district court erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program, . . . rather than by focusing upon her academic and technical qualifications as required by the newly promulgated regulations, *supra* at 1161 and * * * that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability. *Supra* at 1160.

In doing so, the Fourth Circuit Court of Appeals wholly misconstrued the HEW regulations implementing Section 504 as those regulations define an "otherwise qualified handicapped person." What the Circuit Court failed to understand, but what additional HEW regulations make clear, is that, in this case, the ability to hear distinctly is indeed a technical qualification for participation in the student nursing program.

This mandate of the Circuit that a college entirely disregard the nature of the applicant's handicap is directly at odds with the HEW regulations. The Analysis of the HEW regulations specifically addresses this point, rejecting the *"but for"* test employed by the Fourth Circuit and making clear that

an "otherwise qualified handicapped person" is one who is qualified *"in spite of"* of his/her handicap:

> Paragraph K of Section 84.3 defines the term "qualified handicapped person". Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such result was not intended by Congress. In all the respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable. 45 C.F.R. Chapter 84, Appendix A, p. 376.

Were this Court to adopt the "but for" test enunciated by the Fourth Circuit for qualification of handicapped persons to be admitted to college, the nine state colleges operated by the Commonwealth of Pennsylvania might well find themselves required to admit the profoundly mentally retarded to graduate degree programs or the quadraplegic to forestry programs. There is no question that the Circuit Court's analysis of technical qualifications lacks logic and understanding and must, therefore, be reversed.

II. The Fourth Circuit misconstrued the extent to which Section 504 requires colleges and universities to modify their educational programs to accommodate the handicapped.

The Commonwealth does not dispute that at times it may be necessary, desirable and legally mandated to modify educational programs in order to allow qualified handicapped persons to participate in them. However, an important point must be made. The Fourth Circuit ordered the district court to consider on remand the plaintiff's contention that the college could be required to modify the nursing program so as to accommodate her and her hearing disability. The Circuit Court then quoted from two sentences of Section 84.44 (a) of the HEW 504 regulations entitled "Academic Requirements." *Supra* at 1162. Since the Circuit Court did not consider the HEW regulations' discussion of the meaning of "qualified handicapped person", it failed to address the core sentence of this regulation which states:

> . . . Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. . . . 45 C.F.R. §84.44-(a).

There should be no question that a college, such as a State College of Pennsylvania, should not be required to exempt handicapped persons from *es-*

sential course work in a degree program. Such an exemption obviously does a disservice not only to the other students in the program, but also to those individuals who later will rely upon the college's degree to assume that those who hold that degree have successfully completed certain course work.

Thus, for example, in Pennsylvania a liberal arts degree from a state college means that the holder of that degree has proficiency in at least one foreign language. Those who deal with holders of these degrees from a Pennsylvania State College have the assurance that they are hiring someone with such a proficiency. Yet, in Pennsylvania, at least one student has submitted that a cerebral palsy condition renders him incapable of taking a foreign language course in his liberal arts program and that he should be excused from that requirement by reason of Section 504.

Were Pennsylvania to follow the ruling of the Fourth Circuit in this regard, the Commonwealth would have to dilute this degree in order to accommodate a person who is or claims to be handicapped from pursuing precisely the goal that he seeks to achieve: a fully equal, quality education. Significantly, the Analysis of its regulations provided by HEW unequivocally states, to the contrary, that:

> This requirement . . . does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. 45 C.F.R. Chapter 84, Appendix A, p. 388.

Pennsylvania urges this Court to adopt the reasonable approach of HEW and reject the Fourth Circuit's construction.

III. Section 504 does not give rise to a private right of action in a federal court by a handicapped individual who has not exhausted his administrative remedies.

Even if this Court should imply a private right of enforcement under Section 504, it has not been properly exercised in this case, nor does the Fourth Circuit order its proper exercise. The Fourth Circuit has failed to note the absolute prohibition of judicial action pending the completion of administrative proceedings by HEW on a complaint filed under Section 504 at the administrative level. Section 45 C.F.R. §80.8(d) which is applicable to Section 504 proceedings, provides:

> No action to effect compliance by any other means authorized by law shall be undertaken until (1) the responsible department official has determined that compliance cannot be secured by voluntary means, (and) (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance. . . .

Some of the consequences of the failure by the Fourth Circuit to give effect to this regulation have already

been demonstrated in the above discussion of the Fourth Circuit's failure to consider the appropriate HEW 504 regulations in its decision in this case. Other consequences to entities such as Pennsylvania will be addressed more fully in Section IV of this brief.

In this situation, even should this Court find a private right of action, the appropriate remedy would be to suspend further court proceedings pending the filing of a complaint by plaintiff with HEW and a final determination by HEW on that complaint.

IV. If such a private right of action is implied, the handicapped applicant must first pursue and exhaust applicable HEW administrative remedies respecting individual complaints of discrimination.

The Commonwealth joins with the petitioners in their argument that this Court must hold that purportedly handicapped individuals must exhaust their administrative remedies with HEW under Section 504 before being allowed to bring actions in federal court. No restatement of that argument will be made here. It must be said, however, that confusion alone will ensue if the implementing federal agency is not allowed to bring its expertise to bear on this issue in the first instance.

The absence of any exhaustion requirement has encouraged multiple complaints arising out of the

same action affecting the same purportedly handicapped individual. Pennsylvania is already facing the problem of having handicapped and purportedly handicapped individuals file multiple complaints against it before various agencies, arising out of the same job action or other action which affects those individuals. No attempt will be made to be exhaustive. For example, one Susan L. has filed employment discrimination charges with HEW under Section 504 of the Rehabilitation Act of 1973, the United States Department of Labor under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, and the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act. Horace B. has filed employment discrimination charges arising out of one job action with the Pennsylvania Human Relations Commission (which dismissed those charges), the Equal Employment Opportunity Commission under Title VII (which dismissed those charges), the Department of Labor under Section 503 and the Vietnam Era Veterans' Readjustment Act (which Department is currently investigating the claimant's allegations) and HEW under Section 504 (which is also currently investigating the allegations made).

As difficult as this situation is and as wasteful of the taxpayers' money, it can only be rendered worse should this Court decide that it is not necessary for a handicapped person to exhaust the administrative procedures available to him before bringing an action in federal court to vindicate his rights under Section 504. Only by allowing that administrative and judicial review process to proceed in its proper order, can

premature and misconceived decisions be avoided and the rights of the handicapped be realized to the benefit of themselves and society.

Respectfully submitted,

ROBERT E. RAINS
Deputy Attorney General
ALLEN C. WARSHAW
Deputy Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General Director, Office of Civil Law
EDWARD G. BIESTER, JR.
Attorney General

Date: February 22, 1979

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES

JOSEPH A. KEYES, JR.
Suite 200
One Dupont Circle, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

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---

BRIEF AMICUS CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES

OPINIONS BELOW

The opinion of the court of appeals is reported at 574 F.2d 1158 (4th Cir. 1978); the opinion of the district court is reported at 424 F. Supp. 1341 (E.D.N.C. 1976).

CONSENT TO FILE

This Amicus Curiae brief is being filed with the consent of all parties to the proceeding.[1]

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[1] Letters of consent of all parties to the case have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The Association of American Medical Colleges is a voluntary, nonprofit, non-governmental corporation established under the laws of the State of Illinois, having its principal place of business in the District of Columbia. Its corporate purpose is the advancement of medical education. Its institutional membership includes all one hundred twenty four accredited and operating non-profit medical schools and medical colleges in the United States. Its membership also includes over 400 teaching hospitals in which undergraduate and graduate medical education is conducted, and 68 academic societies, the members of which are medical school faculty or otherwise actively engaged in medical education. *Amicus* fully supports equal rights for handicapped persons and the purpose of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Its members conduct programs and activities receiving Federal financial assistance and have an obligation to comply with the Act. They have a concomitant responsibility for the well being of patients, those directly entrusted to their care and those eventually seeking the assistance of the physicians they train. Because the Act as interpreted by the court of appeals threatens to undermine their ability to meet this latter obligation, *amicus* has an important stake in this Court's consideration of the case.

It is the firmly held belief of *amicus* and its members that the practice of medicine, regardless of the specialized branch ultimately pursued, requires the acquisition of a fundamental competence in biomedical and behavioral sciences, the development of basic clinical skills and the capability of exercising sound clinical judgment. It is toward these ends that undergraduate medical education leading to the M.D. degree is directed. All medical students are required to take not only didactic courses in theoretical science but also clinical clerkships involving the personal assumption of responsibility for the care of patients under supervision. This nexus between medical education and patient welfare, disregarded or inadequately considered by the court of appeals, constitutes the basis of *amicus'* concern. For it is a virtual certainty that certain handicaps will be so debilitating as to prevent a person from safely carrying out tasks and accepting responsibilities required of all students in the M.D. program. Persons with such handicaps would not only be incapable of successfully completing the program, they would be a hazard to the well being of the patients with whom they come in contact. It would be irresponsible and immoral for medical schools to accept such persons as medical students. It cannot have been the intent of Congress in enacting section 504 that medical schools be required to do so. Yet that appears to be the result which follows inescapably from the order of the court below that the candidate be evaluated for admission *without regard to her disability.*

QUESTIONS PRESENTED

I. Whether section 504 of the Rehabilitation Act of 1973 must be construed to require an institution of higher education receiving Federal funds to admit a handicapped person whose handicap makes it impossible to participate effectively in the educational program and the career to which it leads?

II. Whether section 504 requires an institution to change its academic requirements or take other action to compensate for the disability of a handicapped applicant for admission?

III. Whether section 504 impliedly creates a private right of action that may be enforced by an individual without resort to federal administrative remedies?

Of these the Association of American Medical Colleges will address only the first which bears directly on its particular interest as *amicus*.

ARGUMENT

The statute prohibits the exclusion of "an otherwise qualified handicapped individual . . . solely by reason of his handicap" from any program or activity receiving Federal financial assistance.[2] The key terms "otherwise qualified," left undefined by the Congress, were interpreted by the district court in a fashion described by the court of appeals as giving them "their ordinary common meaning."[3] Neither their ordinary meaning, nor the definitions in the subsequently published HEW regulations[4] require the result reached by the court of appeals, that the admission decision be made *without regard to* the handicap.[5]

---

[2] Section 504 provides that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[3] 574 F.2d at 1160.

[4] 45 C.F.R. § 84.3(k)(3) requires that:

> With respect to post-secondary and vocational education services [an otherwise qualified handicapped person is one] . . . who meets the *academic* and *technical* standards requisite to admission or participation in the recipient's education program or activity. [Emphasis added.]

[5] 574 F.2d at 1160.

Arguably, the evil that Congress intended to remedy was the practice of arriving at unwarranted judgments to the detriment of handicapped individuals on a superficial observation of the handicap rather than a diligent inquiry into the capability of the person, with appropriate support, to perform satisfactorily the tasks legitimately required of all matriculants or participants. This view is consistent with the conclusion of the district court, it is reconcilable with the HEW implementing regulations, and it is consistent with the court of appeals' focus on academic and technical standards rather than on handicap. All that is necessary is the recognition that concepts which must now be articulated by academic institutions under the rubric of technical standards[6] have always played an important role in academic decisions.

Programs educating students for entry into the health professions have always included in their admissions deliberations considerations related to the suitability of the applicant to provide patient care. Indeed, the safety and welfare of patients is of primary concern, not only with respect to those patients that the student may ultimately encounter in his post-educational career, but also those who will receive his ministrations during the training period. Thus, any person who represents a potential hazard to patients because of his inability to satisfactorily perform required tasks, even though academically qualified, has never been regarded as an admissible candidate. While it is arguable that such performance requirements should have been

---

[6] "The term technical standards refers to all nonacademic admissions criteria that are essential to participation in the program in question." 45 C.F.R. § 84 App. A, at 376 (1977).

articulated in a far more explicit fashion in order to assure a fairer evaluation of all candidates, it is nevertheless true that prior to the publication of the HEW regulations, there had never been any *requirement* (nor from a school's point of view, any pressing need) to do so.

Thus, the district court decision, having been reached prior to the publication of the HEW regulations, related to legitimate and important academic concerns but focused inappropriately on the handicap rather than technical qualifications or the performance expectations. The appellate court's focus on academic and technical standards is well placed but its remedy was misdirected. Instead of requiring Southeastern to consider Davis without regard to her handicap, it should have required the institution to specify, and measure Davis against, supportable technical performance standards related to the legitimate demands of the program on all participants.

The discussion by the court of appeals of limited v. unlimited certification at footnote six is the closest that court comes to addressing the concerns of this *amicus*. 574 F.2d at 1161. Its logic, however, is seriously flawed because it flows from a misidentification of the cognate issue. The fundamental issue is not whether there are certain tasks associated with a profession that can be adequately performed by a handicapped person. Rather it is whether or not such a person can be safely and effectively educated and trained as a competent professional. A professional must be capable not only of performing certain tasks when called upon to do so, but also of making the requisite observations and exercising the level of clinical judgment involved in determining which procedures need to be performed, at what time and with what effect.

Because a psychiatrist can practice much of his specialty without resort to invasive procedures, for example, a superficial analysis may lead one to believe that a person with deficient vision could be trained as a psychiatrist with relative ease. This conclusion results from a misconception of a psychiatrist as a theoretically trained psychological counselor. But a psychiatrist is not a psychologist; he is first and foremost a physician practicing a specialized branch of medicine. He must be fully trained as a physician, capable of recognizing and treating pathological states of organic as well as inorganic origin. This kind of training requires a sound grounding in the development of clinical skills which can be achieved only through participation in the series of clerkships in medicine, surgery, pediatrics, obstetrics and gynecology which characterize undergraduate medical education. These clerkships, in turn, require the student to assume, under supervision, gradually increasing professional responsibility for the care of patients whose welfare is the ultimate object of the training. A person who is incapable of safely and effectively participating in such training cannot morally be admitted to a medical education training program.

This is not to say that all vision impairments are disqualifying, but rather that the determination of admissibility must be left to the sound judgment of the medical faculty applying appropriately developed technical standards. Nor does this deny that a technically unqualified handicapped individual might fruitfully participate in some of the courses offered in medical school or effectively perform some tasks associated with medicine. It is only to demonstrate that some handicaps will

inevitably disqualify some persons from the full course of training necessarily required of all physicians.

The Association of American Medical Colleges has commissioned a working group to study the HEW regulations as they relate to medical school admissions and to develop guidelines to assist schools who wish to develop their own technical standards. The report of this group has been distributed to each member school. Appendix A. *Amicus* believes that this is a promising approach which is fair to applicants, permits compliance with the statute, the intent of Congress, and the HEW regulations. Most importantly it permits academic institutions to deal rationally with their dual responsibility to their students and their patients. It precludes the unfortunate consequences which would flow from the decision of the court of appeals—the matriculation of an applicant who would be a hazard to the very patients he was being trained to assist.

CONCLUSION

For the foregoing reasons, the decision of the circuit court should be reversed.

Respectfully submitted,

JOSEPH A. KEYES, JR.
Suite 200
One Dupont Circle, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

APPENDIX

APPENDIX A

ASSOCIATION OF AMERICAN MEDICAL COLLEGES

Memorandum #79-4 January 25, 1979

To: Members of the Assembly

FROM: John A. D. Cooper, M.D., President

SUBJECT: Report of the Special Advisory Panel on Technical Standards for Medical School Admission

In March 1978 the Executive Council appointed a Special Advisory Panel on Technical Standards for Medical School Admission and asked the members to review the Department of Health, Education and Welfare regulations relating to Section 504 of the 1973 Vocational Rehabilitation Act, as amended. That statute established a broad governmental policy forbidding discrimination against the handicapped in any program receiving federal financial assistance. The Panel was charged with recommending for institutional consideration guidelines for the development of technical (nonacademic) standards for use in the medical school admissions process. The attached report was approved for transmittal to all medical schools at the January 18, 1979 Executive Council meeting.

It is the Association's hope that this report will serve as a guide to each school in developing technical standards consistent with its own education, research and service objectives. The report is not an official AAMC policy statement, but only an aid to schools seeking assistance in the development of such standards. Its uniform adoption by all medical schools is not expected; the Association is confident that the technical standards developed by individual medical schools will reflect not only the diversity of such institutions, but their commitment that qualified handicapped applicants be admitted.

You will note that the report cautions that these guidelines have not been reviewed by HEW for compliance with their regulations and, therefore, no guarantee can be made that adherence to these standards will protect schools from challenge by disappointed applicants. Rather, the report reflects the conclusion of the Panel and the Executive Council that there are certain minimum standards for physicians that must be examined and enforced in the admissions process.

Any further questions on the Section 504 regulations or this report can be referred to Kat Dolan in my office (202-466-5173).

Attachment

Report of the AAMC Special Advisory Panel on Technical Standards for Medical School Admission

Introduction

In the Rehabilitation Act of 1973, as amended, Section 504 specifies that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." The Department of Health, Education and Welfare issued regulations implementing the legislation in May 1977 (see Appendix A). The Association of American Medical Colleges has expressed its concern over the impact of these regulations on medical education and admissions policies. In response to the request of many schools, the Executive Council of the Association established a Special Advisory Panel on Technical Standards for Medical School Admission to review the regulations, to assess their impact on medical schools, and to advise schools on compliance with the regulations. The Panel has met three times and has discussed the regulations with a representative of HEW's Office of Civil Rights.

The Panel has joined the Association in condemning the denial without cause of medical school admission to handicapped individuals. The report of the Panel describes medical education and delineates guidelines for minimum technical standards for the Doctor of Medicine degree. Individual schools may wish to use the report to develop technical standards for admission and performance expectations for graduation. Schools should be cautioned, however, that the Panel has not asked HEW to review these guidelines for compliance with Section 504, and cannot guarantee that adherence to them will protect schools from challenge. Rather, these guidelines reflect the Panel's conclusion that there are certain minimum technical standards for physicians which must be examined and enforced in the admissions process.

The Panel has included background material that is familiar to all medical school faculty and administrators to assist interested persons outside of the medical profession in their understanding of the special problems faced by medical schools in their efforts to comply with this law and the accompanying regulations.

Medical Education

The education of a physician encompasses the following components: a preparatory phase in college; a rigorous professional education leading to the M.D. degree; postgraduate or residency training; and "lifelong" continuing education after the conclusion of formal training. Unlike most other professions, medicine awards its degree midway through the educational process and the degree certifies that the individual has acquired a broad base of knowledge and skills requisite for the practice of medicine. It must be emphasized that good patient care requires that the medical education process prepare an individual to be a physician, not a surgeon, a psychiatrist or any other specialist. A broad medical education is, therefore, prerequisite for

entry into specialized postgraduate training programs which in turn require a common body of knowledge, skills, and behaviors. Certain specialties such as psychiatry even include broad general medicine experiences as part of their graduate training program, supporting the final analysis that a good specialist must be first a good physician.

Medical education requires that the accumulation of scientific knowledge be accompanied by the simultaneous acquisition of skills and professional attitudes and behavior. It is in the care of patients that the physician learns the application of scientific knowledge and skills. It is impossible to consider changes in medical education without considering their impact on patients who are an integral part of the educational process. Faculties of medicine have immediate responsibilities to students and patients and ultimate responsibilities to society to graduate the best possible physicians. Admissions standards for medical school must be rigorous and exacting and admissions must be extended only to those who are best qualified to meet the performance standards of medical schools.

The Accreditation Process, Medical School Curricula and the Admission of Students

There are 124 medical schools in the United States accredited by the Liaison Committee on Medical Education, an agency established in 1942 by the Association of American Medical Colleges and the American Medical Association, to assume accreditation responsibilities previously undertaken separately by these organizations. The accreditation of medical schools by this agency assures the public that a school has met national educational standards, that its graduates have completed a rigorous education and achieved the levels of competency necessary for the awarding of the Doctor of Medicine degree, and that the welfare of the patient is protected by compliance with professional norms. Additionally, the accreditation process provides assurance

to state licensing bodies that a candidate for licensure has received a nationally approved education in medicine. State agencies in turn accept the educational qualifications of a candidate for licensure if he has graduated from a medical school accredited by the LCME.

In defining a medical school curriculum, faculties are obligated to adhere to the guidelines provided by the LCME in "Functions and Structure of a Medical School." The educational program leading to the M.D. degree is described therein as follows:

> "The need of every medical student to acquire a foundation of knowledge in the biomedical sciences is self-evident. It is also evident that this foundation necessitates learning objectives related not only to a knowledge of biomedical sciences which are a prerequisite for the study of clinical medicine, but must encompass those fundamentals which will serve as a basis for life-long learning of a constantly changing and expanding body of knowledge.
>
> The foundation of knowledge in the biomedical sciences should include, but not necessarily be limited to, all of the major disciplines of the biological and behavioral sciences. Biochemistry, Pharmacology, Physiology, Anatomy, Pathology and Microbiology are the traditional generic fields of the biomedical sciences, which, along with appropriate elements of the behavioral sciences, are usually considered essential for the education of the physician. These should be taught in sufficient depth and breadth to insure that there is a fundamental knowledge for ongoing continuing medical education.
>
> The study of clinical medicine can best be accomplished with an emphasis on the problems of patients. It is a responsibility of the faculty to insure that each student is provided with an opportunity to observe and

to participate in the expert care of patients with a broad spectrum of disease in each of the major disciplines of medicine. In addition to the traditional clerkships in medicine, pediatrics, surgery, obstetrics and gynecology, and psychiatry, many institutions offer interdisciplinary clerkships and/or clerkships in family medicine. The continued competence of the physician in future years will require that every student utilize the fundamentals of both biomedical and clinical knowledge to evaluate and understand current literature so that as physicians they will understand advances in biomedical sciences and their applications to clinical medicine.

The clinical phase of the curriculum should provide an opportunity for the study of both mental and physical disease, as well as preventive medicine, and the socioeconomic aspects of health and disease, in both well and sick persons and groups. This instruction should relate both to hospitalized and to ambulatory patients. The objectives of the clinical phase of medical education should be described for each of the major disciplines, insuring that there is achievement of comprehensive knowledge in each of these disciplines."

Writing more broadly, the LCME adds further guidelines for a medical curriculum:

"Each student should acquire a foundation of knowledge in the basic sciences that will permit the pursuit of any of the several careers that medicine offers. The student should be comfortably familiar with the methods and skills utilized in the practice of clinical medicine. Instruction should be sufficiently comprehensive so as to include the study of both mental and physical disease in patients who are hospitalized as well as ambulatory. At the same time, it should foster and encourage the development of the specific and unique

interests of each student by tailoring the program in accordance with the student's preparation, competence, and interests by providing elective time whenever it can be included in the curriculum for this purpose.

Attention should also be given to preventive medicine and public health, and to the social and economic aspects of the systems for delivering medical services. Instruction should stress the physician's concern with the total health and circumstances of patients and not just their diseases. Throughout, the student should be encouraged to develop those basic intellectual attitudes, ethical and moral principles that are essential if the physician is to gain and maintain the trust of patients and colleagues, and the support of the community in which the physician lives."

Using the above as guidelines, the faculty of a medical school has the freedom and ultimate responsibility for the design, implementation and evaluation of the medical school curriculum. Such autonomy on the part of a university in matters relating to the curriculum as well as in the selection of faculty and students has long been recognized by the judicial system. This freedom permits innovation and experimentation in the learning resources used, the methods of instruction and the format of the curriculum. Whether traditional or innovative, the curriculum designed by a medical school faculty must ultimately be best suited to the resources of the school, must be in consonance with an institution's education, research and patient care objectives, and must meet LCME requirements.

The faculty of a medical school also bears the responsibility for evaluating student performance and insuring that each student who receives the M.D. degree has fulfilled all requirements of the curriculum. The evaluation of students and the curriculum are both critically reviewed during the accrediting process. If either are found to be deficient, the school's accreditation may be in jeopardy.

In the admission of students, medical school faculty are guided by the LCME which has stated in the "Functions and Structure of a Medical School" that admission decisions should be based not only on satisfactory prior scholastic achievement, but also upon considerations of "personal and emotional characteristics, motivation, industry, resourcefulness and personal health." The LCME will countenance no discrimination on the basis of sex, creed, race or national origin and mandates that students "possess the intelligence, integrity, and personal and emotional characteristics appropriate to the effective physician."

Faculties have placed strong emphasis on the academic achievements of applicants in the sciences relevant to medicine and they have sought evidence of breadth of education. Cognizant of their responsibilities to patients who will be a part of the educational process and to future patients who will entrust their welfare and their lives to graduates, faculties have examined with care the character, personal qualities, motivation, physical health and emotional stability of applicants. Admission has been offered to those who present the highest qualifications for the study and practice of medicine.

Fulfillment of the Requirements for the M.D. Degree

Because the M.D. degree signifies that the holder is a physician prepared for entry into the practice of medicine within postgraduate training programs, it follows that graduates must have the knowledge and skills to function in a broad variety of clinical situations and to render a wide spectrum of patient care.

Candidates for the M.D. degree must have somatic sensation and the functional use of the senses of vision and hearing. Candidates' diagnostic skills will also be lessened without the functional use of the senses of equilibrium, smell and taste. Additionally, they must have sufficient exteroceptive sense (touch, pain and temperature), sufficient proprioceptive sense (position, pressure, movement, stereognosis and vibratory) and sufficient motor function to permit them to carry out the activities described in the sections that follow. They must be able consistently, quickly, and accurately to integrate all information received by whatever sense(s) employed, and they must have the intellectual ability to learn, integrate, analyze and synthesize data.

A candidate for the M.D. degree must have abilities and skills of five varieties including observation; communication; motor; conceptual, integrative and quantitative; and behavioral and social. Technological compensation can be made for some handicaps in certain of these areas but a candidate should be able to perform in a reasonably independent manner. The use of a trained intermediary means that a candidate's judgment must be mediated by someone else's power of selection and observation.

I. *Observation:* The candidate must be able to observe demonstrations and experiments in the basic sciences, including but not limited to physiologic and pharmacologic demonstrations in animals, microbiologic cultures, and microscopic studies of microorganisms and tissues in normal and pathologic states. A candidate must be able to observe a patient accurately at a distance and close at hand. Observation necessitates the functional use of the sense of vision and somatic sensation. It is enhanced by the functional use of the sense of smell.

II. *Communication:* A candidate should be able to speak, to hear and to observe patients in order to elicit information, describe changes in mood, activity and posture, and perceive nonverbal communications. A candidate must be able to communicate effectively and sensitively with patients. Communication includes not only speech but reading and writing. The candidate must be able to communicate effectively and efficiently

in oral and written form with all members of the health care team.

III. *Motor:* Candidates should have sufficient motor function to elicit information from patients by palpation, auscultation, percussion, and other diagnostic maneuvers. A candidate should be able to do basic laboratory tests (urinalysis, CBC, etc.), carry out diagnostic procedures (proctoscopy, paracentesis, etc.) and read EKGs and x-rays. A candidate should be able to execute motor movements reasonably required to provide general care and emergency treatment to patients. Examples of emergency treatment reasonably required of physicians are cardiopulmonary resuscitation, the administration of intravenous medication, the application of pressure to stop bleeding, the opening of obstructed airways, the suturing of simple wounds, and the performance of simple obstetrical maneuvers. Such actions require coordination of both gross and fine muscular movements, equilibrium and functional use of the senses of touch and vision.

IV. *Intellectual-Conceptual, Integrative and Quantitative Abilities:* These abilities include measurement, calculation, reasoning, analysis, and synthesis. Problem solving, *the* critical skill demanded of physicians, requires all of these intellectual abilities. In addition, the candidate should be able to comprehend three dimensional relationships and to understand the spatial relationships of structures.

V. *Behavioral and Social Attributes:* A candidate must possess the emotional health required for full utilization of his intellectual abilities, the exercise of good judgment, the prompt completion of all responsibilities attendant to the diagnosis and care of patients, and the development of mature, sensitive and effective relationships with patients. Candidates must be able to tolerate physically taxing workloads and to function

effectively under stress. They must be able to adapt to changing environments, to display flexibility and to learn to function in the face of uncertainties inherent in the clinical problems of many patients. Compassion, integrity, concern for others, interpersonal skills, interest and motivation are all personal qualities that should be assessed during the admissions and education processes.

Compliance with Section 504

Medical schools are encouraged to look beyond the stereotypes of handicapped individuals and to develop innovative and creative ways of opening the medical school curriculum to competitive, qualified handicapped individuals. Schools have already exhibited flexibility in adapting to the special needs of the educationally disadvantaged and the Association believes that accommodations for some handicaps can occur. Schools are cautioned that the integrity of the curriculum must be maintained and that those elements deemed essential to the education of a physician must be preserved. Since the treatment of patients is an essential part of the educational program, schools must at all costs act to protect the health and safety of patients.

Individual schools are encouraged to use this report to develop technical standards for use in the admissions process. It is inevitable that adherence to minimum requirements will disqualify some applicants including some who are handicapped. This does not imply, however, that a school has discriminated against these applicants. Since discrimination requires drawing a distinction without sufficient justification it follows that making discriminatory judgments on justified grounds is acceptable.

The Association believes that it is not only reasonable but essential for good patient care to require minimum standards for the education of physicians. In assessing applicants for admission it is appropriate for schools to

consider cumulative and progressive disability, as well as the applicant's current physical and emotional status, and drug-induced impairments that may disturb patients and pose obstacles to the safe application of the student's knowledge and skills.

This report has emphasized that the M.D. degree is a broad, undifferentiated degree which is essential for entry into postgraduate training. In the admissions process a medical school must judge not only the scholastic accomplishments and potential of an applicant but also the physical and emotional capacities of the applicant to meet the full requirements of the school's curriculum and to graduate as a skilled and effective practitioner of medicine.

The Panel considered including a list of disease states and handicaps that could compromise the essential abilities and skills that each physician must have. However, the members concluded that a comprehensive list would be encyclopedic and hence, always incomplete. Therefore, the Panel decided to provide (Appendix B) a number of questions related to the outlined above guidelines that might be considered and evaluated in the admissions process. A review of the curricular requirements for accreditation and of the skills described herein should enable medical schools to determine their own technical standards.

Conclusions

The Panel made an extensive review of medical education that went far beyond the essential information contained in this report. As a result, the Panel urges medical school faculties to engage in similar reviews in the development of their technical standards. Compliance with the law, while preserving the required curriculum and protecting the welfare of the patients, demands technical standards that are well reasoned and fully justified. In conclusion, the Panel affirms that:

—The medical education process, which focuses so largely on patients differs markedly from postsecondary education in fields outside the health sciences.

—The primary responsibility for the selection of students and for the content of the curriculum rests with the medical school and its faculty.

—The M.D. degree is, and must remain, a broad, undifferentiated degree attesting to the acquisition of general knowledge in all fields of medicine and the basic skills requisite for the practice of medicine.

—The guidelines for the admission of students and for the education of students as set forth by the Liaison Committee on Medical Education must continue to govern the decisions of medical school faculties.

—All students of medicine must possess those intellectual, ethical, physical and emotional capabilities required to undertake the full curriculum and to achieve the levels of competence required by the faculty.

—Although certain handicaps or combinations of handicaps will prevent some candidates from meeting these minimum technical standards, individual schools should take all necessary steps to prevent unjustified discrimination against the handicapped.

Appendix A

Section 504 of the Rehabilitation Act of 1973, as amended:

> No otherwise qualified handicapped individual in the United States, as defined in Section 7(6), shall, solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

Following are definitions from the regulation implementing Section 504. The complete regulation and an analysis prepared by the Department of Health, Education and Welfare appeared in the May 4, 1977 *Federal Register* (Vol. 42, No. 86, pages 22676-22701).

> *Handicapped person:* any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.
>
> *Physical or mental impairment:* (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.*
>
> *Qualified handicapped person:* With respect to post-secondary and vocational education services, a handicapped person who meets the academic and technical

* A ruling by the Attorney General has included addiction to alcohol and narcotics as a handicap for the purpose of this statute.

> standards requisite to admission or participation in the recipient's education program or activity.
>
> *Technical standards:* not defined in the regulation. The accompanying analysis states: The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

Appendix B

This appendix provides sample questions illustrating how medical schools might use these general guidelines to assess individual candidates for admission. In effect, the application of these general guidelines in admissions decisions creates nonacademic or technical standards. To be nondiscriminatory such standards must be considered in all admissions decisions.

This list is not meant to be all-inclusive but rather to serve as a guide to each medical school in developing nonacademic standards consonant with its own objectives in patient care, education, and research. The questions are designed not to disqualify candidates, but to give an admissions committee more complete information about a candidate's ability to meet the school's standards.

1. Is the candidate able to observe demonstrations and experiments in the basic sciences?

2. Is the candidate able to analyze, synthesize, solve problems, and reach diagnostic and therapeutic judgments?

3. Does the candidate have sufficient use of the senses of vision and hearing and the somatic sensation necessary to perform a physical examination? Can the candidate perform palpation, auscultation, and percussion?

4. Can the candidate reasonably be expected to relate to patients and establish sensitive, professional relationships with patients?

5. Can the candidate reasonably be expected to communicate the results of the examination to the patient and to his colleagues with accuracy, clarity and efficiency?

6. Can the candidate reasonably be expected to learn and perform routine laboratory tests and diagnostic procedures?

7. Can the candidate reasonably be expected to display good judgment in the assessment and treatment of patients?

8. Can the candidate reasonably be expected to perform with precise, quick and appropriate actions in emergency situations?

9. Can the candidate reasonably be expected to accept criticism and respond by appropriate modification of behavior?

10. Can the candidate reasonably be expected to possess the perserverance, diligence, and consistency to complete the medical school curriculum and enter the independent practice of medicine?

Panel On Technical Standards For Medical School Admission

M. Roy Schwarz, M.D.—Chairman
Associate Dean, Academic Affairs
University of Washington School of Medicine

J. Robert Buchanan, M.D.
President
Michael Reese Hospital and Medical Center

Gerald H. Holman, M.D.
Dean
Eastern Virginia Medical School

John H. Morton, M.D.
Department of Surgery
University of Rochester Medical Center

Molly Osborne, Ph.D.
University of Colorado School of Medicine

Malcolm Perry, M.D.
Department of Surgery
Cornell University Medical College

Jerome B. Posner, M.D.
Memorial Sloan-Kettering Cancer Center

Ann S. Peterson, M.D.
Associate Dean, Student Affairs
Columbia University College of Physicians & Surgeons

Alain B. Rossier, M.D.
Chief of the Spinal Cord Injury Service
Veterans Administration Hospital, Boston

Harold M. Visotsky, M.D.
Chairman, Department of Psychiatry
Northwestern University Medical School

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE FOR INDEPENDENT COLLEGES AND UNIVERSITIES, THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND THE ASSOCIATION OF GOVERNING BOARDS AS *AMICI CURIAE* URGING REVERSAL

RICHARD A. FULTON
DAVID M. DORSEN
SACHS, GREENEBAUM & TAYLER
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 872-9090

Attorneys for the National Institute for Independent Colleges and Universities, the Association of American Universities, the American Association of State Colleges and Universities, and the Association of Governing Boards

Of Counsel:

CHRISTINE YOUNG TOPPING
1717 Massachusetts Ave., N.W.
Washington, D.C. 20036

THOMAS HYLDEN
1620 Eye Street, N.W.
Washington, D.C. 20006

Washington, D.C. • THIEL PRESS • (202) 638-4521

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INTERESTS OF THE AMICI CURIAE

The National Institute for Independent Colleges and Universities ("NIICU"), the Association of American Universities ("AAU"), the American Association of State Colleges and Universities ("AASCU"), and the Association of Governing Boards ("AGB"), are non-profit membership organizations whose members comprise a broad spectrum of American higher education, public and private, graduate and undergraduate. (Copies of letters from

the parties consenting to the amici filing this brief have been filed with the Clerk of the Court.)

NIICU's membership consists of approximately 800 independent, non-public colleges and universities. AAU's membership consists of sixty public and private universities with major post-graduate, professional, and research programs. AASCU's membership consists of 325 state assisted colleges and universities. AGB's membership consists of representatives from the governing or advisory boards of about 1,250 colleges and universities.

The amici and their members completely support equal rights and equal opportunity for handicapped persons, as well as the policies and purposes underlying the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* (Supp. V, 1975), as amended ("the Act"). In particular, the amici support the policy of nondiscrimination against the handicapped as embodied in section 504 of the Act, 29 U.S.C. § 794 (Supp. V, 1975).[1] The amici's member

[1] Section 504, as amended, provides in full:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress and such regulation may take effect no earlier than the thirteenth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794 (Supp. V, 1975), as amended by the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2982 (1978).

colleges and universities look forward to and do work internally, with each other, with handicapped students, and with appropirate state and local vocational rehabilitation agencies in a genuine effort to make equal access and opportunity a reality for handicapped persons.[2] The amici are concerned, however, that some interpretations of Section 504, such as that of the court of appeals below, have gone beyond equal opportunity and nondiscrimination in a way not intended by Congress and in a way that could have a significant adverse impact on higher education.

The Court's interpretation of the meaning of section 504 in this case will affect significantly the rights and obligations of all federal financial aid recipients. Because substantially all the amici's member institutions benefit from such aid in one form or another, they have a strong interest in the reasoned interpretation of section 504.

Specifically, the amici are concerned that the decision under review, *Davis v. Southeastern Community College,* 574 F.2d 1158 (4th Cir. 1978) goes beyond the meaning of and purpose behind section 504 in at least two ways:

(1) by requiring institutions of higher education to admit a handicapped person to a particular educational program even where the effects of the handicap render that person unqualified to perform or participate in the essential academic and technical requirements of the program; and

[2] *See, e.g.*, G. Biehl, Guide to Section 504 Self-Evaluation for Colleges and Universities (undated) (manuscript developed by the Bureau of Education for the Handicapped, Office of Civil Rights, Department of Health, Education and Welfare, in conjunction with (and published by) the National Association of College and University Business Officers and the American Council on Education).

(2) by holding that institutions of higher education may be required to modify essential requirements of their academic programs and to provide special services to individual handicapped persons without regard to the costs of the services.

QUESTIONS ADDRESSED BY THE AMICI

1. Whether Section 504 of the Rehabilitation Act of 1973 requires an institution of higher education to admit a handicapped person to a particular educational program when the effects of the handicap render that person unqualified to perform or participate in the essential requirements of the program?

2. Whether Section 504 requires an institution of higher education to modify essential requirements of an educational program or to provide costly special services in order to compensate for the disability of a particular handicapped student?

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. §794 (Supp. V, 1975) provides in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

I. The plain meaning of section 504 supports the district court's interpretation that a handicapped individual is otherwise qualified for admission to a program of higher education if she is able to perform the essential requirements of the program in spite of her handicap. In a case where the effects of a person's handicap directly preclude her from performing essential program requirements, to hold as did the court of appeals that qualifications must be assessed without regard to handicap is to ignore Congress's use of the word "qualified." Further, the statute's use of the phrase "solely by reason of his handicap" supports the district court's interpretation because it clearly suggests that the effects of a handicap can be among the factors considered. Indeed, the court of appeals conceded that the district court had given the statute its "ordinary common meaning." *Davis v. Southeastern Community College*, 574 F.2d 1158, 1160 (4th Cir. 1978).

The legislative history of section 504 and the subsequently enacted Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619, provide no indication that Congress intended institutions receiving federal financial assistance to waive necessary program qualifications in order to accommodate handicapped individuals unable to meet those qualifications. Rather, the purpose of the Act was to eliminate decisionmaking based upon stereotyped notions of the handicapped. That purpose is satisfied when a school accords a handicapped person who statisfies program requirements in spite of her handicap treatment equal to that of any other qualified applicant.

45 C.F.R. §84.4(3)(k) (1978), 42 Fed. Reg. 22678 (1977) defines a "qualified handicapped person," with respect to post-secondary education, as a handicapped person "who meets the academic and technical standards requisite to admission or participation in the recipient's program or activity." In explaining this definition, HEW specifically stated that Congress did not intend "otherwise qualified handicapped person" to "include persons who are qualified *except for* their handicap, rather than *in spite of* their handicap." 42 Fed. Reg. 22686 (1977) (emphasis supplied). The HEW regulations, upon which

the court of appeals purported to rely, thus specifically reject the court of appeals' conclusion.

Sound policy considerations support the conclusion that Congress could not have intended section 504 to eliminate legitimate requirements for admission in cases where the effects of an applicant's disability preclude the applicant from satisfying a particular requirement. Particularly in areas such as nursing, where the clinical requirements of the program directly involve the health and safety of patients with whom the student comes in contact, public policy requires that schools be allowed to examine whether an applicant—whether handicapped or not—satisfies essential program requirements.

The basic policy of nondiscrimination statutes is to remove artificial barriers to, not to eliminate legitimate qualifications for, positions sought. Just as title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, was not intended "to guarantee a job to every person regardless of qualifications," *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), section 504 was not intended to guarantee admission to academic programs regardless of qualifications.

If section 504 is interpreted to require schools to waive educational requirements in cases where a person's particular disability precludes her from satisfying the requirements, the courts will necessarily become involved in the setting of curricula requirements. Just last term, in *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), the Court reviewed the factors underlying deference to educational decisions, concluded that those factors "warn against any such judicial intrusion into academic decisionmaking," and refused to overturn an academic decision to dismiss a medical student for unsatisfactory performance in the clinical portions of her curriculum.

II. A comparison of section 504 with section 503 of the Rehabilitation Act of 1973 shows that the Congress knew how to impose affirmative action requirements with respect to the handicapped and chose not to do so in section 504. Therefore, there is no requirement under section 504 that a school modify essential elements of its academic curriculum or provide, at its own expense, costly special services to accommodate a particular handicapped student.

The overall structure of the Rehabilitation Act, which in subchapters I through III, 29 U.S.C. §§ 701-776, provides federally financed programs to offer services to the handicapped, indicates that Congress did not intend in section 504 (in subchapter V of the Act) to shift the burden of providing such services to general recipients of federal financial assistance. Certainly no such intent appears in the language of section 504, nor in the legislative history, and this Court should not undertake to read into the section such a requirement. To the extent nondiscrimination might in some instances require schools to make reasonable accommodations to handicapped students, the accommodations should not interfere with the essential academic requirements of the school and should not require the school to bear more than *de minimis* minimal costs. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

ARGUMENT

I.

SECTION 504 OF THE REHABILITATION ACT OF 1973 DOES NOT REQUIRE A COLLEGE OR UNIVERSITY RECEIVING SOME FEDERAL FINANCIAL ASSISTANCE TO ADMIT A HANDICAPPED PERSON TO A PARTICULAR EDUCATIONAL PROGRAM WHERE THE EFFECTS OF THE HANDICAP RENDER THAT PERSON UNQUALIFIED TO PERFORM OR PARTICIPATE IN THE ESSENTIAL REQUIREMENTS OF THE PROGRAM.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, provides in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The first question presented by this case is whether, and to what extent, section 504 permits a federal aid recipient to take into account the nature of an applicant's handicap in deciding whether to admit the applicant to a particular educational program.[3] Although conceding that a school may consider "academic and technical qualifications" in making an admission decision, the court of appeals held that section 504 flatly precludes the school from considering the nature of a person's handicap in deciding whether the person is qualified for admission. *Davis v. Southeastern Community College*, 574

[3]It appears to be undisputed that Respondent is a handicapped person within the meaning of 29 U.S.C. §706(6), that Petitioner is the recipient of some federal financial assistance, and that Respondent was denied admission to Petitioner's Associate Degree Nursing Program.

F.2d 1158, 1160-61 (4th Cir. 1978), *rev'g* 424 F. Supp. 1341 (E.D.N.C. 1976).[4]

While the court of appeals held that section 504 requires a person's qualification's to be considered *"without regard to* her disability", *Id.*, 574 F.2d at 1160 (emphasis supplied), the district court had held that the proper focus is whether the person is able "to function sufficiently in the position sought *in spite of* the handicap, if proper training and facilities are suitable and available." *Id.*, 424 F. Supp. at 1345 (emphasis supplied). Finding from the evidence adduced at trial that Respondent's hearing disability "actually prevents her from safely performing in both her training program and her proposed profession", 424 F. Supp. at 1345,[5] the district court held that Petitioner's decision not to admit Respondent to its registered nurse program was not a violation of section 504. For the reasons given below, the district court's interpretation of the statute was correct, and the court of appeal's construction of section 504 is

[4]The phrase "academic and technical qualifications" was a reference by the court of appeals to 45 C.F.R. §§84.1 *et seq.*, Appendix A, ¶5, 42 Fed. Reg. 22687 (1977), wherein the Department of Health, Education and Welfare ("HEW") states, with reference to postsecondary education programs:

> . . . both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all nonacademic admission criteria that are essential to participation in the program in question.

Although the court of appeals quotes this statement with apparent approval, and although lack of a particular physical handicap obviously could be (as it was found to be in this case) "essential to participation" in a program, it is clear from the rest of the court's opinion that handicap is not to be considered among the technical standards for admission. This point is discussed in more detail in I.C., *infra*.

[5]This finding of the district court was not disturbed on appeal.

contrary to the section's plain meaning, to the legislative history of the Rehabilitation Act of 1973, to the HEW regulations effectuating the section, and to sound public policy considerations.

A. The Plain Meaning of Section 504 Permits an Institution of Higher Education To Consider Whether the Effects of a Particular Person's Handicap Disqualify Her from Admission to a Particular Educational Program.

Section 504 prohibits discrimination against an "otherwise qualified handicapped individual," without defining the phrase. The court of appeals conceded that the district court had given the phrase its "ordinary common meaning" in defining it to mean "otherwise able to function sufficiently in the position in spite of [her] handicap, if proper training and facilities [were] suitable and avialable." *Id.*, 574 F.2d at 1160-61.[6] That the district court's interpretation of the statute is mandated by the plain meaning of the language is clear from the definitions. "Otherwise" means "in other respects", and "qualified" means "fitted for a given purpose." Webster's Third New International Dictionary (1975). Quite clearly, a handicapped person is "in other respects fitted for the given purpose" of an educational program if the person can satisfy the essential requirements of the program in spite of his or her handicap. To construe "otherwise" as meaning "without regard to handicap"—which

[6]The court of appeals' reversal was based not upon analysis of the meaning of the language of the statute, but rather upon the HEW regulations referred to in footnote 4, *supra*, which were promulgated after the district court's decision. In section I.C., *infra*, we show that the court of appeals' analysis of the regulations was incorrect.

would be necessary to affirm the court of appeals decision—would be to read out of the statute the word "qualified". To do so would violate "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsburg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932). Accordingly, the only reasonable interpretation of section 504 is that, although a handicapped person cannot be considered unqualified simply because of the fact of a handicap, the federal aid recipient nonetheless can consider the mental or physical manifestations of the handicap in deciding if the person is "otherwise qualified."

The above interpretation of the language "otherwise qualified" is supported by Congress's having included in section 504 the phrase "solely by reason of [her] handicap." First, the phrase indicates only that handicap may not be the sole reason for rejection, not that it may not be considered along with other factors. Second, where an applicant is denied admission to a program because the program necessarily requires certain skills which the applicant's handicap precludes, the rejection is not based upon the fact of handicap, but upon the particular manifestations of the handicap taken in conjunction with considerations of the requirements of the program to which the person is seeking admission.

The conclusion that the effects of a person's handicap may preclude him or her from being "otherwise qualified" within the meaning of section 504 is consistent with the conclusion of the only other circuit court specifically to address the question. In *Kampmeier v. Nyquist,* 553 F.2d 296 (2d. Cir. 1977), two junior high school students with vision in only one eye sought a preliminary

injunction barring public school authorities from refusing to allow them to participate in contact sports. In affirming the district court's denial of plaintiff's application for preliminary injunction, the court stated:

> As we read §504, however, exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy. Section 504 prohibits only the exclusion of handicapped persons who are "otherwise qualified." Here the defendants have relied upon medical opinion that children with sight in only one eye are not qualified to play in contact sports because of the high risk of eye injury. The plaintiffs have presented little evidence—medical, statistical, or otherwise—which would cast doubt on the substantiality of this rationale.

Id., 553 F.2d at 299. Accordingly, the plain meaning of the statute allows a federal aid recipient to consider the relationship between mental or physical mainifestations of a person's handicap and the activity to which the person is seeking admission in determining whether the person is "otherwise qualified" for the activity.

B. The Legislative History of the Rehabilitation Act of 1973, as Amended, Does Not Support the Conclusion That a Handicapped Individual Must Be Admitted to a Program Receiving Federal Financial Assistance Without Regard to the Effects of Her Handicap.

Section 504 was initially passed as part of the Rehabilitation Act of 1973, Pub. L. 93-112 (hereinafter "the Act"). There were no hearings on section 504 and it was not the subject of debate during the 93rd Congress. The section is mentioned only twice, and then

briefly, in S.Rep. 93-318, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News, 2076, 2123, 2143. However each passage speaks only in terms of a general prohibition against discrimination and does not define the phrase "otherwise qualified." The very essence of nondiscrimination, however, is that individuals who are similarly situated are to be treated equally. There would be no such equal treatment if handicapped individuals could gain access to programs despite their failing to possess (because of the effects of a handicap) a qualification considered essential to performance or participation in the program, whereas persons who lacked the qualifications for reasons unrelated to handicap (for example, lack of education or experience) would be barred from the program. Such unequal and preferential treatment is not favored. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977); *see generally Regents of the University of California v. Bakke*, 98 S. Ct. 1733 (1978). Thus, although the legislative history of the 1973 Act is scant, it supports the proposition that a handicapped individual, to be eligible for admission to a program receiving federal assistance, must be qualified for the program.

In the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, which amended the definitions of "handicapped individual" appearing at 29 U.S.C. §706(6), Congress significantly did not disturb the phrase "otherwise qualified" in section 504. Prior to the 1974 amendments, "handicapped individual" had been defined for all purposes in terms of a handicapped person's employability or ability to benefit from the vocational rehabilitation services provided for in subchapters I through III of the Act. (Section 504 appears in subchapter V of the Act). The 1974 Amendments retained the old definition

for the purposes of subchapters I through III of the Act. However, for the purposes of subchapters IV and V of the Act, which are not limited to employment and vocational rehabilitation services, the term "handicapped individual" was defined more broadly as a person who actually has a physical or mental impairment that substantially limits one or more of the person's major life activities, or as a person who is perceived as or has a record of having such impairments. 29 U.S.C. §706(6) (Supp. V, 1975). The reason for the amendment is explained thus in the Senate Report:

> It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the indiviudal's potential benefit from vocational rehabilitation services under titles I and III (in the case of both sections 503 and 504) of the Act.

S. Rep. No. 93-1297, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, 6388. It is thus clear from the legislative history that the purpose of the amendments was not to remove the requirement that a person be "otherwise qualified" for the nondiscrimination policy of section 504 to apply, but rather to make the nondiscrimination provision of section 504 applicable in areas where employability might be irrelevant to the particular program receiving federal assistance, or in areas where the program receiving assistance is other than a vocational rehabilitation program.

The fact that the 1974 Amendments' redefinition of "handicapped individual" was not meant to remove the requirement that such an individual be "otherwise qualified" for a particular program receiving aid can be

seen by reference to the following statement in the Senate Report:

> It should also be noted that, although the "employability" confining context of the present Rehabilitation Act section 7(b) definition of "handicapped individual" is removed from the new definition as to section 503 as well as the use of the term elsewhere in titles IV and V, section 503 itself relates solely to employment and thus the adjective "qualified" in modification of "handicapped individual" in that section clearly requires that the "employability" of the handicapped individual in question is a prerequisite to section 503 application.

Id., [1974] U.S. Code Cong. & Ad. News at 6391. Since section 504 is not limited to employment or vocational rehabilitation services, no similar remark had to be made concerning section 504. However, the same reasoning applies. Section 504 relates to participation in federally assisted programs and thus the adjectival phrase "otherwise qualified" in modification of "handicapped individual" in that section clearly requires that the handicapped person be capable of participating in the program as a prerequisite to section 504 application.

The legislative history shows not only that the 1974 amendment did not remove the requirement that a handicapped individual be qualified for a program to which he or she seeks admission, but also that the purpose of section 504 is to ensure that the qualifications of handicapped individuals are measured fairly on an individual basis and not on the basis of invalid, stereotyped notions about the effects of a handicap. This latter purpose of section 504 is apparent from the plain language of the 1974 Amendment's definition of "handicapped individual":

> [S]uch term means any person who (A) has a mental or physical impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment.

29 U.S.C. §706(6) (Supp. V, 1975). The focus, therefore, is to be on the actual *effects* of the handicap on the person's ability to perform, not on the mere *fact* (real or imagined) of handicap. As the Senate Report states,

> [The definition] focuses on substantial limitations of one or more of an individual's major life activities, rather than focusing on handicaps to employment, vocational goals, and prospective benefit from vocational rehabilitation services.
>
> In addition, the proposed definition of "handicapped individual" would include individuals who have a record of that kind of impairment (this would include those who have a record that was in fact a false record; for example, a child who has been classified incorrectly as mentally retarded) and an individual who is regarded as having such a substantial limitation (such as a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning).

S. Rep. 93-1297, *supra*, [1974] U.S. Code Cong. & Ad. News at 6414. The amici submit, therefore, that federal aid recipients are not required to ignore handicap as it may impact upon legitimate and necessary qualifications for a particular program, but rather are required to focus on whether there is a real impairment which actually does preclude the person from meeting the requirements of the program.

C. The HEW Regulations Effectuating Section 504 Clearly Allow an Institution of Higher Education To Deny Admission to a Handicapped Individual Whose Particular Disability Renders Her Incapable of Performing or Participating in the Particular Program for Which She Seeks Admission.

As noted above, the court of appeals' interpretation of section 504 rests neither on the plain meaning of the section nor on its legislative history. Rather the court based its decision on HEW regulations implementing section 504. Although section 504 itself contains no authorization for the promulgation of such regulations,[7] the Secretary of HEW was ordered by the President to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Ex. Order No. 11914, 41 Fed. Reg. 17871 (1976). Regulations subsequently were promulgated and appear at 45 C.F.R. §§84.1 *et seq.*, 42 Fed. Reg. 22676 (1977). To the extent these regulations are consistent with the legislative purpose behind section 504 and are promulgated within the scope of the power delegated HEW by Ex. Order No. 11914, they are entitled to great weight in interpreting the meaning of section 504. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Udall v. Tallman*, 380 U.S. 1 (1965). Accordingly, we turn to an analysis of the regulations as they concern the definitation of "otherwise qualified handicapped individual" and the descriptions of discriminatory practices regarding institutions of higher education.

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[7] Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, by contrast, specifically requires the President to promulgate regulations to "implement the provisions of this section. . . ."

The general nondiscrimination clause of the regulations provides:

> No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

45 C.F.R. § 84.4(a) (1978); 42 Fed. Reg. 22678 (1977). The phrase "qualified handicapped person" is defined:

> (k) "Qualified handicapped person" means:
>
> (3) With respect to postsecondary and vocational education services, a handicapped person who meets the *academic and technical standards requisite to admission or participation in the recipient's program or activity*.

45 C.F.R. § 84.3(k)(3) (1978), 42 Fed. Reg. 22678 (1977) (emphasis supplied). The section by section analysis of the regulations explains § 84.3(k)(3) as follows:

> [T]he paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

45 C.F.R. § 84.1 *et seq.*, App. A, ¶ 5, 42 Fed. Reg. 22687 (1977).

In the instant case the district court found that communication abilities which Respondent lacked were a necessary requisite to the program to which Respondent sought admission.[8] *Davis v. Southeastern Community*

[8] It is important to note that the nursing program required students to be able to communicate with patients as part of the

[footnote continued]

College, supra, 424 F. Supp. at 1343, 1345-46. In the language of the regulations, communications abilities were a technical standard for participation in the clinical component of the nursing program. The court of appeals' ruling that handicap could not be considered at all in the admission process thus waived one of the "standards requisite to admission or participation in the program" and is clearly contrary to HEW's interpretation of the statute.

The above conclusion is reinforced by the portion of the HEW section by section analysis concerning the definition of "qualified handicapped person":

> Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the

curriculum. This is not a case, therefore, where the handicap hinders the student in *acquiring* the content of the course (*e.g.*, as in listening to a lecture or reading a textbook) but a case where the handicap is an obstacle to the content itself. It also should be noted that Petitioner's determination that Respondent was unqualified was not based upon stereotyped notions of the handicapped, but rather upon a particularized analysis of the Respondent's disability in relation to the requirements of the nursing program. In this connection, the school had Respondent tested by an audiologist, considered his report carefully, consulted with and obtained a report from the Executive Director of the North Carolina Board of Nursing, and submitted all the records for review by a committee of staff nurses. *Id.*, 424 F. Supp. at 1343.

> qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

45 C.F.R. § 84.1 *et seq.*, Appendix A, ¶ 5, 42 Fed. Reg. 22686 (1977). Thus HEW's interpretation of the intent of the statute completely supports that of the district court: "otherwise qualified" means "qualified in spite of handicap," not "qualified without regard to handicap."

That the Congressional intent in enacting section 504 was not to abolish, for handicapped persons only, legitimate program admission and participation standards is reinforced by the HEW comments concerning drug addiction and alcoholism, which may be handicaps. In this connection, the section by section analysis of the regulations provides:

> It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be

> taken into account in determining whether he or she is qualified.
>
> * * *
>
> With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

45 C.F.R. §§ 84.1 *et seq.*, App. A, ¶ 4, 42 Fed. Reg. 22682 (1978). What is said above about drug addiction and alcoholism applies with equal logic to other forms of handicap. It is only reasonable to allow a federal aid recipient to take into account the manifestations of a handicap in deciding whether the applicant is qualified for admission to a particular program.

Finally, when HEW later promulgated regulations to coordinate federal agency implementation of section 504, it reiterated its earlier position, outlined above, that section 504 only prohibits discrimination against qualified handicapped persons. 45 C.F.R. § 85.51 (1978), 43 Fed. Reg. 2137 (1978). The term was defined thus:

> "Qualified handicapped person" means (a) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the

> essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services."

45 C.F.R. §85.32 (1978), 43 Fed. Reg. 2137 (1978). That the effects of handicap can be taken into consideration in determining if an individual meets the essential program requirements was made clear by the "supplementary information" issued by HEW to explain the regulations:

> [T]his Department believes that its definition [of "qualified handicapped individual"] more adequately emphasizes the prohibition against deeming a handicapped person to be unqualified on the basis of functions that are not necessary to the successful performance of the job in question.
>
> * * *
>
> The Secretary again wishes to reassure recipients that such considerations [as factors of safety] are appropriate and are not considered a violation of section 504, so long as they are based on facts relating to the individual applicant's qualifications, rather than on assumptions or stereotypes.

43 Fed. Reg. 2134 (1978).[9] It is clear, therefore, that handicap can be considered to the extent it affects an applicant's qualifications to perform functions that are necessary to performance in the program to which she seeks admission. In the instant case, Petitioner reasonably concluded, and the district court so found, that

[9]The above passage also reinforces the conclusion of part I.B., *supra*, that the policy behind section 504 is to eliminate consideration of handicapped individuals based upon stereotyped notions, not to eliminate a school's reasonable qualifications for admission.

Respondent was not fitted for the program to which she applied. The court of appeals erred in holding that handicap could not be considered in determining whether an applicant is qualified.

D. Sound Public Policy Considerations Support the View That Section 504 Permits the Effects of a Person's Handicap To Be Considered in Making an Admission Decision to a Particular Educational Program.

As shown above the public policy underlying section 504 is to eliminate stereotyped notions of the capabilities of handicapped or apparently handicapped individuals as a basis for exclusion from programs receiving federal financial assistance. It would be unfortunate if a statute whose central aim is to eliminate stereotyped decision-making were to be interpreted so as to give rise to an equally harmful generalization that all individuals with a disability are able to perform as if the disability did not exist. Yet this is precisely the result of the court of appeals decision that, in academic admissions cases, the nature or effects of a handicap cannot be considered.

The court of appeals opinion, by prohibiting consideration of the effects of handicap, violates the sound public policy requiring that individuals be qualified for the programs for which they seek admission. The prospective student applying for admission, the institution seeking to educate its students, and the public at large which relies upon the school and its graduates—all have a strong interest that legitimate admissions qualifications be satisfied. What has been said about the necessity of being qualified in the context of employment discrimination on the basis of race and sex is equally pertinent in the

context of educational program discrimination on the basis of handicap:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. . . . What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment. . . .

Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). In the instant case, to consider Respondent for admission without regard to handicap is to consider her without regard to qualifications. On the basis of the evidence below, it cannot be concluded that the clinical requirements of Petitioner's nursing program were artificial, unnecessary or arbitrary. The district court properly considered Respondent's qualifications in light of those requirements and concluded that she was not qualified. Section 504 and important policy considerations require no more.

The policy requiring that an applicant be qualified is particularly strong where admission is sought to programs which involve risks or potential risks to the applicant or to others. The need to balance the degree of risks and the duties owed others in these circumstances clearly necessitates consideration being given to the nature of the individual's handicap. Thus, in *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977), the medical risk to a handicapped student of participation in contact sports was found to be sufficient justification under section 504 for the school to deny such participation. And, in *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972), a title VII defendant was not required to lower its qualification standards for applicants to the position of airline flight officer because of the risks to others:

> [W]hen the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. . . . The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.

Id., 475 F.2d at 219.

The above policy considerations are applicable to a nursing program which legitimately requires students to perform functions which impact the safety and health of patients with whom they come in contact. In this case, Respondent was not rejected on the basis of artificial or stereotyped notions about the effect of the handicap. Rather, Respondent, like all applicant to the nursing program, was required to undergo a physical examination as a prerequisite to admission. When the examination revealed a hearing disability, Respondent was not summarily rejected. Rather, an in-depth audiological evaluation was performed and, as the record shows, the limitations imposed by the presence of Respondent's hearing disability were carefully compared to the program requirements of the nursing school. Petitioner successfully established below that the particular and necessary requirements of its Associate Degree Registered Nursing program rendered Respondent unqualified to participate because of the particular effects of her disability. The district court specifically found, on the basis of the evidence that "[Respondent's] handicap actually prevents her from safely performing in both her training

program and her proposed profession." *Davis, supra,* 424 F.Supp. at 1345.[10]

If section 504 requires colleges and universities to admit a student without regard to her physical or mental ability (due to handicap) to satisfy the requirements of a particular program to which she is admitted, then either the student later will be dismissed for failure to meet the program's requirements or the school will have to modify or delete its curriculum requirements as to that student. Congress certainly could not have intended, and no policy would require, that schools admit a student without regard to a disability and then dismiss her because of the disability. Nor, the amici submit, did Congress intend to involve itself, the executive,[11] or the judiciary in the determination of what are and what are not reasonable curriculum requirements.

In *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78 (1978), the Court rejected a

[10]The existence of reasonable educational program requirements which might bar participation due to a particular individual's disability is not limited to graduate or professional programs. For example, undergraduate majors such as dance, physical education, physical therapy and dental hygiene may necessarily require certain physical activity on the part of a student which might be precluded by the student's particular disability.

[11]In this connection, one commentator has noted:

> Most foreign countries have established ministries of education or comparable governmental organs at national, state, or local levels, to oversee their higher educational systems. The situation in the United States, however, is quite different. The federal government has never attempted to vest complete authority over higher education in a single body, and state regulation has been relatively insignificant.

The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation, 52 Corn. L.Q. 104 (1966).

former medical student's claim, based upon procedural and substantive due process grounds, that she had been unlawfully dismissed from medical school for alleged unsatisfactory performance in the clinical rotations. Finding that the decision to dismiss Respondent was an academic one—"rest[ing] on the academic judgment of school officials that she did not have the necessary clinical ability to perform as a medical doctor"—the Court distinguished the case from dismissals based upon disciplinary grounds where more process is due. *Id.*, 435 U.S., at 86. In reaching its decision the Court acknowledged "the significant and historically supported interest of the school in preserving the present framework for academic evaluations" and noted that "[c]ourts are particularly ill equipped to evaluate academic performance." *Id.*, 435 U.S., at 86 n.3, 92.[12]

The same considerations of academic freedom and expertise which prompted the *Horowitz* Court to reject the student's procedural due process attack on her dismissal were applied to reject her substantive due process attack on the merits of the dismissal decision:

> The factors discussed in Part II with respect to procedural due process speak a fortiori here and warn

[12]The Court's deference to educators' setting their own standards and evaluating students was not dicta but a necessary finding in deciding the amount of process which the student is due. This is so because the requirements of due process in a particular situation depend broadly upon a balance of the interest of the decision-maker in the procedure adopted and the interest of the person affected by the decision in greater safeguards. *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970). The Court in *Horowitz* acknowledged the great importance to the student of continuing to pursue her medical education, but concluded that the academic interests of the institution sufficiently outweighed the student's career interest so as to justify the particular procedures used by the school in dismissing her. 435 U.S., at 86, n 3.

> against any such judicial intrusion into academic decision making.

Id., 435 U.S., at 92 (footnote omitted).

Both student evaluation and determination of curriculum content are academic decisions requiring the expertise and experience of the educator. Accordingly, the traditional judicial deference accorded to evaluation of academic performance logically should extent to decisions relating to the specifications of an academic program.[13] In this case the district court necessarily had to find that the clinical requirements of Petitioner's nursing program were reasonable and necessary to the nursing curriculum, since it defined "otherwise qualified" to mean that the person must be "able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are available." 424 F. Supp. at 1345. The reasonableness of a clinical component in a nursing program and the wisdom of allowing the school to determine if the student can satisfy the component is underscored by Mr. Justice Powell's observation in *Horowitz* that:

> [I]t is well to bear in mind that respondent was attending a medical school where competence in clinical courses are as much a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the "book-learning" portion of the curriculum. Evaluation of her performance in the former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.

435 U.S., at 98 (Powell, J. concurring.)

The essential function of a college or university is the design and implementation of the academic program. Such a program is derived from an evaluation of institutional objectives and goals as well as from the perception of faculty and administration as to the necessary substance and methodology to be embodied in specific courses of study. As can be expected in an autonomous system of higher education, a healthy diversity exists in programs of study which by title appear to be identical. Judicial involvement in academic determination of what is or is not essential to an academic program of study would seriously reduce and hamper the ability, and perhaps motivation, of educators to experiment or innovate a course and program offerings, thus placing a chill on one of the essential functions of the educational community.

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[13] In this connection Mr. Justice Frankfurter has stated:

> . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

II.

SECTION 504 DOES NOT REQUIRE AN INSTITUTION OF HIGHER EDUCATION TO MODIFY ESSENTIAL ELEMENTS OF ITS EDUCATIONAL PROGRAM OR TO PROVIDE COSTLY SPECIAL SERVICES TO COMPENSATE FOR THE DISABILITY OF A PARTICULAR HANDICAPPED STUDENT.

A. Section 504 Does Not Require Modification of an Academic Program To Eliminate Requirements That Are Essential to the Program.

The court of appeals below held that the district court erred by failing to consider that Petitioner could be required to modify its nursing program to accommodate Respondent. The amici contends that there is no such requirement in section 504 and that the HEW regulations do not require modification of a program to eliminate academic requirements which are essential to the program being pursued by the student.

By its terms, section 504 is a nondiscrimination statute, not an affirmative action statute. The language of section 504 – which speaks only in terms of exclusion, denial of benefits, and discrimination – is to be contrasted with the language of section 503 – which speaks in terms of affirmative action.[14] Two points are significant about the language of the two sections. First, section 503 is writen explicitly in terms of affirmative action, implying that section 504, which is written only in terms of nondiscrimination, was not intended to require affirmative action. Second, the affirmative action provision of section 503 applies to qualified handicapped individuals, so that, if an affirmative action requirement somehow were to be read into section 504, the requirement should not go so far as to require a federal aid recipient to take affirmative steps to aid an unqualified person, such as Respondent was found to be by the district court.[15]

The amici do not dispute that the principle of nondiscrimination might in some cases require reasonable accommodations to a *qualified* handicapped individual. For example, one can easily envision situations where a mechanical aid or other device might be used to overcome the effect of a particular disability, and the school

[14] Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, provides in pertinent part:

> Any contract in excess of $2500 entered into by any Federal department or agency . . . shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . .

[15] The legislative history of the Rehabilitation Act of 1973, and of the Rehabilitation Act Amendments of 1974, likewise make clear that Congress perceived section 503 as an affirmative action statute and section 504 as a nondiscrimination statute. *See* S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076, at 2123, 2143, *and* S. Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, at 6388, 6390, 6413. Typical of the legislative history's references to the two sections is as follows:

> The principal application of this new definition [of "hand capped individual" contained in 29 U.S.C. § 706(6)] would be to . . . the affirmative action program under Federal contracts, as set forth in section 503 . . . and the prohibition against discrimination against qualified handicapped individuals under Federally assisted programs or activities, as set forth in section 504.

S. Rep. No. 92-1297, *id.*, [1974] U.S. Code Cong. & Ad. News at 6413. It is interesting to note that, in describing section 504, Congress used the phrase "against qualified handicapped individuals" rather than "otherwise qualified." As argued in part, I.C., *supra*, it is the amici's position, like that of HEW, that the two terms are interchangeable and that the mere word "otherwise" in section 504 was not intended to mean that a federal aid recipient must waive qualifications for program admission which are essential to participation in the program.

should not interfere with or preclude the use of such devices. In other cases, where an individual's disability does not preclude her from completing the essential requirements of the program of study, the school might alter or allow substitutions for nonessential (although generally required) elements of the program which the individual otherwise could not satisfy, in order to allow completion of the overall program. In the instant case, however, the district court found that Respondent "would be unable to perform in the program even with an improved hearing aid" and there were essential elements of the clinical program (operating room, intensive care unit, post-natal care unit, one on one situations with doctors and patients) for which Respondent was not qualified. *Davis, supra,* 424 F.Supp. at 1343.

That section 504 does not compel schools to alter essential curriculum requirements to facilitate the admission and participation of an unqualified handicapped student is underscored by the HEW regulations, which provide:

> A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. *Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirements will not be regarded as discriminatory within the meaning of this section.* Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

45 C.F.R. §84.44(a)(1978), 42 Fed. Reg. 22684 (1978) (emphasis supplied). Thus, even HEW, which did read some affirmative action requirements into section 504,[16] did not go so far as the court of appeals below in holding that Petitioner might have to modify its nursing program to accommodate Respondent, without regard to the fact, found by the district court, that Respondent's handicap prevented her from participating in activities necessary to Petitioner's nursing program and to licensing requirements which the program seeks to prepare students for.

B. Section 504 Does Not Require an Educational Institution, at Its Own Expense, to Provide Special Services to an Individual Handicapped Person Without Regard to the Financial Consequences to the School of Such Action.

1. Neither the plain language of nor the legislative history behind section 504 requires a school affirmatively to provide special services.

In addition to holding that section 504 requires a federal aid recipient to alter necessary elements of its educational program to accommodate the needs of an applicant not qualified for the program as currently structured, the court of appeals also required the district court to consider 45 C.F.R. §84.44(d)(1), which requires a school to provide auxiliary aids, including interpreters for the deaf, to handicapped students. The court noted that application of the regulation would be appropriate without regard to the expense caused thereby to the school. *Davis, supra,* 574 F.2d at 1162. The court's lack of concern for the financial consequences of the regulation reflects that of HEW:

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[16] *See,* part II.B., *infra.*

> [E]nding discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemptions from section 504 or this regulation: Congress' mandate to end discrimination is clear.

42 Fed. Reg. 22676 (May 3, 1977). The amici agree that the mandate to end discrimination is clear. The question, however, is whether the HEW regulations properly concluded that section 504 also includes a mandate that schools, at their own expense, provide special services to accommodate qualified handicapped students.

The considerations argued in Part II.A., *supra,* regarding the plain meaning of and legislative history behind section 504, are equally applicable here and compel the conclusion that section 504, being specifically a nondiscrimination statute and not (like section 503) an affirmative action statute, does not require schools affirmatively to provide special services to the handicapped.

2. The HEW regulations requiring a school affirmatively to provide specialized services, at the school's expense, go beyond the purpose of the Rehabilitation Act.

To the extent the HEW regulations require schools to use their limited resources to pay for whatever auxiliary aid a particular handicapped student needs to overcome the effects of his or her handicap, they are not entitled to judicial deference in interpreting section 504. In *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), a case involving the anti-discrimination provisions of title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, plaintiff relied heavily upon certain Equal Employment Opportunity Commission guidelines interpreting title VII. The Court rejected the Equal Employment Opportunity Commission's interpretation, stating:

> In evaluating this contention it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC Guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability.

Id., 429 U.S. at 141. Since section 504 does not contain a delegation of authority to HEW to make binding regulations and since Ex. Order 11914 authorizes HEW only to establish standards for defining who are handicapped individuals and what are discriminatory practices, the regulations are entitled to little weight where they go beyond their delegated authority and purport to impose affirmative action requirements.

The Rehabilitation Act of 1973, 29 U.S.C. §701 *et. seq.*, as amended by the Rehabilitation Act Amendments of 1974, contains five subchapters: The first three (29 U.S.C. §§701-776) provide for federally financed programs to assist the handicapped in a variety of contexts. Subchapter IV (29 U.S.C. §§780-787) provides for administration and evaluation of the various programs established in Subchapters I through III. Subchapter V (29 U.S.C. §§790-794) contains "miscellaneous provisions," among them section 503 (dealing with affirmative action in employment under federal contracts), and section 504 (dealing with nondiscrimination under federal grants).

Section 504 does not by its terms provide that recipients of federal financial assistance are to provide special services for the handicapped. On the other hand, subchapters I through III of the Act are replete with programs providing special services to the handicapped and financing, with federal funds, the provision of such services.[17] Accordingly, it seems clear that Congress did not intend in section 504 to shift to educational institutions the financial responsibility for providing special services to the handicapped. Congress knew how to require state agencies and other institutions receiving direct federal aid to provide interpreters to the deaf, and had it intended for all recipients of federal assistance to provide such services pursuant to section 504, it would have done so.

3. If an affirmative action component is to be read into section 504, it should be limited to a school's only having to make reasonable accommodations short of undue hardship to provide specialized services.

In *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), the Court addressed the extent to which title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), requires an employer to take efforts to accommodate an employee whose religious beliefs prohibit him from working on Saturday. The statute forbade religious discrimination and required an employer to make "reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Id.*, 432 U.S. at 74. In interpreting the phrases

[17] In fact the provision of interpreters to the deaf is specifically covered by 29 U.S.C. § 723(6).

"reasonable accommodation" and "undue hardship," the Court concluded that an employer would not be required to treat different employees unequally and that the employer need not "bear more than de minimis cost in order to" accommodate the employee. *Id.*, 432 U.S. at 81, 84.

It is true that *Hardison* involved a statute that explicitly contained a requirement limiting an employer's reasonable accommodation obligations to those that result in no undue hardship, unlike section 504. However, it also is true that section 504 does not even contain a requirement that a school make any reasonable accommodation, unlike the statute in *Hardison.* The amici submit that, if the Court is to read an affirmative action provision into section 504 requiring schools to accommodate qualified handicapped students, the provision should be limited to reasonable accommodations that do not impose an undue hardship on the school.

The court of appeals below felt that expense was not a factor in determining the extent of a school's purported obligation to provide special services, *Davis, supra,* 574 F.2d at 1162, and the HEW comments accompanying the regulations specifically note that "burdens and costs" do not limit a school's obligations, 42 Fed. Reg. 22676 (1977). Nonetheless the language of 45 C.F.R. §84.44 (d)(1), when read in connection with the "solely by reason of his handicap" language of section 504, supports a "reasonable accommodation without undue hardship" standard. The regulation provides:

> (1) A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination . . . because of the absence of educational auxiliary aids. . . .

> (2) Auxiliary aids may include . . . interpreters or other effective methods of making orally deliverable materials available to students with hearing disabilities.

It would seem to be a reasonable interpretation of the above language, when read in conjunction with the language "solely by reason of his handicap" in section 504 that a school which does not discriminate against the handicapped in admissions would be in compliance with the regulation if it took all reasonable steps to acquire auxiliary aids for a handicapped student from the local state vocational rehabilitation agency which, pursuant to federal statute, exists to provide such services for the handicapped. It would also seem reasonable to conclude that a school would satisfy its obligation if it fairly determined that the handicapped individual could herself afford to purchase or secure the needed auxiliary aid. It would also seem reasonable that a school would have taken "such steps as are necessary" if it fairly determined that financial considerations prohibit it from supplying the auxiliary aid.[18]

Accordingly, a school admitting a qualified handicapped student at most should be required, with respect to the provision of special services to compensate for a particular student's disability, to make reasonable accommodations to the disability without incurring undue hardship.

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[18] For example, in *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977), the cost of college's providing an interpreter for the deaf plaintiff exceeded the amount of the plaintiff's tuition.

CONCLUSION

For the reasons given above, the judgment of the court of appeals should be reversed. The amici urge the Court to hold that section 504 prohibits discrimination against individuals who are qualified for an academic program *in spite of their* handicap, and that section 504 does not affirmatively require a school to modify its academic requirements or to provide special services to compensate for a particular student's disability. If the court concludes that section 504 does require modification of programs or the provision of special services, then the requirement should be limited to the school's making reasonable accommodations that do not result in undue hardship to the school and do not invade the school's fundamental right to determine the content of its own curriculum.

Respectfully submitted,

RICHARD A. FULTON
DAVID M. DORSEN
SACHS, GREENEBAUM & TAYLER
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 872-9090

Attorneys for the National Institute for Independent Colleges and Universities, the Association of American Universities, the American Association of State Colleges and Universities, and the Association of Governing Boards

Of Counsel:

CHRISTINE YOUNG TOPPING
1717 Massachusetts Ave., N.W.
Washington, D.C. 20036

THOMAS HYLDEN
1620 Eye Street, N.W.
Washington, D.C. 20006

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IN THE

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OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* THE EQUAL EMPLOYMENT ADVISORY COUNCIL

SUSAN A. CAHOON
WILLIAM A. WRIGHT
KILPATRICK, CODY, ROGERS,
McCLATCHEY & REGENSTEIN
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 572-6500

Of Counsel:

DOUGLAS S. McDOWELL
McGUINESS & WILLIAMS
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 296-0333

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

BRIEF FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC), with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary non-profit association organized as a corporation under the laws of the District

of Columbia to represent and promote the common interests of employers and the general public in the development and implementation of sound government policies and procedures to ensure nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975). In addition, most of EEAC's members are federal contractors subject to § 503 of the Rehabilitation Act, 29 U.S.C. § 793 (Supp. V 1975), a companion statute which, unlike § 504, does not use the term "discrimination," merely requires affirmative action "to employ and advance in employment qualified handicapped individuals," and expressly provides for an administrative remedy for noncompliance, 29 U.S.C. § 793(b). Despite the significant differences in these statutes, this Court's resolution of the jurisdictional and substantive issues in this § 504 case will strongly influence the interpretation of similar issues in the § 503 context because of the employment aspects of the present case. For example, the district court found that the respondent's "handicap actually prevents her from

safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations." 424 F.Supp. at 1345.

The EEAC's members are especially troubled by the court of appeals' inexplicable failure to take note of these findings and its apparent lack of concern about the implications of its decision for the future job safety of the handicapped individual herself, her co-workers, or her patients or customers. The Fourth Circuit and other courts of appeals have often emphasized, in other kinds of employment discrimination cases, the importance of safety and efficiency considerations even though the employment practices at issue may have had adverse effects upon protected groups. *See, e.g., Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom. Brennan* v. *Greyhound Lines, Inc.*, 419 U.S. 1122 (1975).

In addition, the members of the EEAC are concerned about the unsupported summary holding of the court of appeals that Section 504 requires "affirmative conduct" even where "expensive," and also about the holding that Section 504 confers a private right of action on alleged victims of handicap discrimination. Both holdings have important implications for employers.

The EEAC sought and was granted permission by this Court to file a brief as *amicus curiae* in the case of *Cannon* v. *University of Chicago*, No. 77-926, now awaiting decision by the Court, which concerns the analogous question of whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, provides an implied private right of action for a rejected student applicant for a graduate professional program.

On numerous other occasions, EEAC has been granted permission by this Court to file briefs as *amicus curiae*. *See, e.g.*, *Furnco Construction Corp.* v. *Waters*, 98 S.Ct. 2943 (1978); *Gardner* v. *Westinghouse Broadcasting Company*, 98 S.Ct. 2451 (1978); *Shell Oil Company* v. *Dartt*, 434 U.S. 99 (1977); and *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

STATUTES AND RULES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> (Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394.)

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

> §84.3 *Definitions*
>
> As used in this part, the term:
>
> * * * *
>
> (k) "Qualified handicapped person" means:
>
> * * * *
>
> (3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

> *Definitions*—5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

STATEMENT OF THE CASE

This case arises under Section 504 of the Rehabilitation Act of 1973, U.S.C. § 974, which provides, in part:

> No *otherwise qualified* handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Emphasis added).

Plaintiff applied for Southeastern Community College's nursing program. Because of severe hearing impairment, the school determined she was not qualified for the program. The school's primary concern was for the safety of patients. It felt, for example, that she would be unable to lip read during surgery or be able, generally, to pick up critical sound clues in life and death situations. Plaintiff then filed suit against the school, alleging she was discriminated against because of her handicap.

The district court dismissed the suit. In construing the words "otherwise qualified," the court relied on their common meaning. It read Section 504 as not allowing the exclusion of a handicapped person from a federally assisted program solely by reason of the handicap, "unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." 424 F.Supp. at 1345. Stated otherwise, the court held that "otherwise qualified" can only be read to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and

available." *Id.* Applying these standards, the court ruled that even with special assistance, plaintiff would be unable to perform the nursing function properly.

The district court found from the evidence that it would be "difficult and, in fact, dangerous for plaintiff to even attempt the clinical portion of the training program". 424 F.Supp. at 1345. The primary, but by no means only, danger of which the court was speaking was the potential peril to patients under her care as a student nurse or a putative registered nurse:

> Her handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations.[1]

The Fourth Circuit reversed. First, it held that there is a private right to sue under Section 504. Second, it remanded the case for reconsideration of the plaintiff's application *without regard to* her hearing disability. It ruled that the district court should focus only upon her academic and technical qualifications. Third, it stated that, on remand, the district court should determine what "affirmative relief" would be appropriate so that the school could be

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[1] A nurse unable to respond to warning sounds in a busy hospital, surrounded by physically and mentally ill, where emergency situations are the rule, not the exception, could easily find herself in danger, and in addition, pose a safety problem to her co-workers, either as a student trainee or as a graduate job-holder.

ordered to accommodate the hearing disability. This would include additional training and supervision "even when such modifications become expensive." 574 F.2d at 1162.

SUMMARY OF ARGUMENT

Section 504 does not prevent a recipient under a federally assisted program from establishing qualification standards which ensure the safety and efficiency of the recipient's operations. The decisions of this Court, HEW's regulations and common sense indicate that the applicant must be qualified *in spite of the* handicap, rather than *without regard to* the handicap. Nor does the statute, which merely proclaims a policy of nondiscrimination, require recipients to undertake costly preferential accommodations for the handicapped. Because there is no "accommodation" language in the statute in question and the costs of complying would be enormous rather than *de minimis*, the decision below is at odds with the decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

Furthermore, handicapped individuals do not have a right to sue private recipients for failing to undertake such "affirmative conduct," or for refusing to jeopardize patient safety by making exceptions to admissions standards. The exclusive remedy for legitimate grievances of qualified handicapped individuals lies with the Department of Health, Education and Welfare pursuant to the procedures of Title VI of the Civil Rights Act of 1964. Judicial review of an adverse agency determination is limited to consideration of whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole.

ARGUMENT

I. Section 504 should not be construed to prevent a recipient of federal assistance from establishing qualifications standards which ensure the efficiency and safety of the recipient's operations.

If the Fourth Circuit's decision is allowed to stand, it will have immediate and direct consequences for employers. The Fourth Circuit ignored the factual findings of the district court and imposed an affirmative conduct standard upon employers which has no support in the relevant statutory language. It also construed the term "otherwise qualified" in a manner which could have a serious impact on safety and efficiency. As shown below, this construction is directly at odds with proper standards for determining business necessity, which include consideration of factors such as the safety and efficiency of the employer's operations.

The district court adopted a common sense approach under which an applicant's qualifications would be judged on the basis of whether that person was qualified *in spite of* the handicap. Similarly, the Department of HEW's analysis of the regulation directly in point omits the word "otherwise" from the definition of qualified. The agency reasoned that those persons protected by the statute should include only those who are qualified "in spite of their handicap," rather than qualified "except for" their handicap. See H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376 (set forth *supra*, p. 5). The reason for this approach was to avoid a result which clearly was unintended by Congress. Under H.E.W.'s example, a blind person possessing all the qualifications for driv-

ing a bus except sight could not be said to be otherwise qualified for the job of driving. (*Id.*)

The court of appeals, however, did not review the district court's factual findings under the usual "clearly erroneous" standard—which, in light of this record, could only have resulted in affirmance—because the court held that the district court erred as a matter of law in considering the nature of the petitioner's disability *at all.* 574 F.2d at 1161; App. at 6a. Further, although purporting to base its ruling on the text of an HEW regulation, 45 C.F.R. § 84.3 (k) (3), together with an explanatory comment from HEW, the Fourth Circuit apparently missed the point of the additional HEW commentary (at 42 Fed. Reg. 22686) on the very issue involved in this case, whether the statutory phrase "otherwise qualified" means qualified *without regard to* the handicap, or qualified *in spite of* the handicap. The court, though it apparently referred to the key commentary by HEW in footnote 7 of its opinion, either rejected or ignored HEW's conclusion that the phrase must mean qualified *in spite of* the handicap. The court of appeals, in adopting the "without regard to" test, arrived at precisely the result the agency viewed as improper. Both a blind bus driver (HEW's example) and a deaf nurse may well be "qualified" for their putative jobs if considered "without regard to" their handicaps—but Congress could not possibly have intended that the individuals be placed in positions requiring sight or hearing just as if their disabilities were imaginary.[2] HEW's interpretation was entitled

[2] The Fourth Circuit's interpretation, in contrast to HEW's, could require an employer to hire drug addicts and alcoholics, and a nursing college to accept applicants addicted to alcohol

or drugs, "without regard to" their addiction. Because of the revolutionary implications of the inclusion of addicts within the Rehabilitation Act's definition of handicap, the initial draft of HEW's Section 504 regulations was met with a deluge of comments expressing shock and concern. *Cf. Connecticut General Life Ins. Co.* v. *Department of I.L.H.R.*, 18 F.E.P. Cases 1447, 1452 (Wis.Sup.Ct. 1979) ("If his drinking was volitional it can hardly be classified as a handicap within the meaning of [the Wisconsin] anti-discrimination statute."). HEW responded with the following more reasonable position which has now been implicitly struck down by the Fourth Circuit's ruling in this case:

> The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

42 Fed. Reg. at 22686 (1977). Congress, moreover, has itself rejected the Fourth Circuit's "without regard to" test, at least insofar as addicts are concerned, by amending the Rehabilitation Act's definition of "handicapped individual" to provide: "For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alco-

to deference by the Fourth Circuit, *see Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971), particularly since the other interpretation does not comport with common sense. This Court has often held that a "literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." *United States* v. *Ryan*, 284 U.S. 167, 175 (1931).[3]

Ms. Davis was applying not for a passive classroom position but for a clinical training program. Thus, her application to Southeastern Community College's nursing program was in large part an application for a job, analogous to an apprenticeship. The assessment of her qualifications by the College necessarily took into account not only her prospective job performance as a student trainee, but also her probable efficiency as a registered nurse. Assuming, therefore, that the clinical training program is at least in part federally funded, and that Section 504 applies to admissions despite the employment aspects

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hol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." P.L. 95-602, 92 Stat. 2983, Section 122 (Nov. 6, 1978).

[3] *Accord, Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892); *Sorrells* v. *United States*, 287 U.S. 435, 446-48 (1932) (collecting cases); *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315 (1938); *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543 (1940); *United States* v. *Shirey*, 359 U.S. 255 (1959); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966).

of the program,[4] the concerns which this Court has expressed in employment discrimination cases for "safe and efficient job performance"[5] are highly relevant.

Under Title VII of the Civil Rights Act of 1964, an employer need only articulate some legitimate, nondiscriminatory reason—such as concern for safety or efficiency—for the use of a selection criterion, to rebut a prima facie case that the employee is a member of a protected class and the selection criterion has a substantial adverse impact upon members of that class.[6] *Board of Trustees of Keene State College* v. *Sweeney*, —— U.S. ——, 99 S. Ct. 295 (1978). Under the Rehabilitation Act of 1973, however, which makes no explicit provision for private suits but instead creates administrative remedies,[7]

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[4] *See Trageser* v. *Libbie Rehabilitation Center, Inc.*, 18 F.E.P. Cases 1141 (4th Cir. 1978), holding that Section 504 authorizes regulation of employment practices only where a primary objective of the federal financial assistance is to provide employment. *See also* Wright, "Equal Treatment of the Handicapped by Federal Contractors," 26 Emory L.J. 65, 66 n.6 (1977).

[5] *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 n.4 (1977).

[6] This case does not raise the important question of whether the Rehabilitation Act requires proof of invidious discriminatory intent. Section 504 by its terms prohibits only that discrimination against *qualified* applicants which is "solely" on the basis of an alleged handicap which does not itself render the applicant unqualified to perform the job or to participate in the program.

[7] In 1978, the Act was amended to grant an explicit right to sue to federal employees under Section 501, but Section 504 claimants were expressly limited to administrative remedies under the Title VI procedures. P.L. 95-602, 92 Stat. 2982, Section 120 (November 6, 1978). *See infra* pp. 35-36.

the protected class is defined in terms of qualifications for particular jobs or programs; that is, protection is limited to "qualified" handicapped individuals. The applicant or employee thus has the burden of proving to the Department of Labor (Section 503) or to HEW (Section 504) that he is qualified for the particular job or program. He must show that he comes within the coverage of the statute before the agency can even proceed to the question of discrimination *vel non*.[8] Thus, a showing of the job-relatedness of a particular physical selection criterion comparable to the showing that would exonerate an employer under Title VII despite adverse impact, must certainly suffice to clear the criterion from a charge of handicap discrimination. This result should obtain unless the applicant or employee can show either that the physical requirement is a mere pretext for intentional discrimination, or that he is qualified for the particular job despite his failure to meet the standard and there

[8] *See, e.g., Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. 200, 202 (N.D. Tex. 1977) (Section 503), *appeal pending*, No. 77-2443 (5th Cir.), *citing* S.Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, at 6390: "[S]ection 503 itself relates to employment and thus the adjective 'qualified' in modification of 'handicapped individual' clearly requires that the 'employability' of the handicapped individual in question is a prerequisite to section 503 application." Because Section 504, like Section 503, limits its protection to those who are "qualified," a Section 504 complainant must likewise prove his qualification for the federally-subsidized job he applied for.

Even under Title VII, of course, an applicant must prove, as part of his prima facie case, that he "was qualified for a job for which the employer was seeking applicants." *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

is some "practical way reliably to differentiate the qualified from the unqualified applicants" in the class of persons who fail to meet the standard. *Cf. Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976) (maximum age rule for bus drivers held justified despite the possibility that certain individuals over that age might in fact be qualified).

It has been held in the Title VII context that certain physical job requirements are so "manifestly job-related" that the "employer need not make an evidentiary showing of business necessity, even though the criterion may have a discriminatory impact." *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (en banc) (good back required for manual labor):[9]

> The need for a manual laborer to have a good back is such a criterion. Smith argues that he was able to do the work. That begs the question when an employee has a defective back condition. *Roberts* v. *St. Louis Southwestern Ry.*, 329 F.Supp. 973, 975-977 (D.Ark. 1971). Common knowledge and experience reflect the problems degenerative backs create for employer, employee and fellow employee alike. As noted in one text, an employer who hires an employee with a latent back defect is "asking for trouble." . . .

[9] No empirical validation is needed to justify certain other types of manifestly job-related criteria besides physical ones. *See, e.g., McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 806-07 (employee's previous participation in a "stall-in" justifies refusal to reemploy); *Subia* v. *Colorado and Southern R. Co.*, 565 F.2d 659, 663 (10th Cir. 1977) (strict leave policy in order to maintain a continuity of work flow is a business necessity).

> The manifest job-relatedness of a requirement that a manual laborer have a good back is bolstered by the frequency with which physical fitness requirements generally have been found to be valid. . . .

555 F.2d at 1287-88 (citations omitted). The court supported these conclusions with numerous citations to cases affirming the facial validity of various (though not all) physical fitness requirements in many different contexts, including the Section 504 context.[10]

The need for a student nurse or a registered nurse to be able to hear is likewise manifestly job-related. As the district court in this case noted, the "trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly." 424 F.Supp. at 1345. Even if the court of appeals could properly have ignored this testimony and disregarded the trial judge's findings, it should have held as a matter of law that a hearing requirement for a student nurse or a registered nurse is manifestly job-related and therefore not illegal as applied to this applicant.[11]

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[10] *Coleman* v. *Darden*, 13 E.P.D. ¶ 11,502 (D.Colo. 1977) (blind person denied job as law clerk), cited by the Fifth Circuit, 555 F.2d at 1288 n.6.

The Department of Labor's Chief Administrative Law Judge, The Hon. H. Stephan Gordon, recently cited *Smith* v. *Olin* in dismissing a Section 503 complaint on behalf of an applicant with a history of back trouble for a job as a carpenter's apprentice. *OFCCP* v. *E.E. Black, Ltd.*, Case No. 77-OFCCP-7R, U.S. Dept. of Labor, Recommended Decision and Order (Sept. 13, 1978), p. 16.

[11] A blanket qualification rule would be justified in these circumstances. However, it should be noted that in this case the college did not merely point to the rule, but gave Ms. Davis an individual examination to determine the probable impact of her hearing disability on her ability to function as a student nurse and, ultimately, as a registered nurse.

As shown below, factors such as safety and efficiency are highly relevant in determining the necessity for an employer's qualification standards. The facts of this case, however, focus more directly on safety concerns which have dictated the outcome of many employment discrimination cases. The mere possibility of jeopardizing life or personal safety often has been held sufficient to defeat an attack on a physical job qualification requirement. For example, in *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) (age discrimination), *cert. denied sub nom. Brennan* v. *Greyhound Lines, Inc.*, 419 U.S. 1122 (1975), the Court held that the carrier was not required to "experiment with the lives of passengers," *id.* at 865, and that:

> [T]he paramount goal of a bus carrier is safety. . . Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy *might* jeopardise the life of one more person than might otherwise occur under the present hiring practice.

499 F.2d at 863 (emphasis added). Likewise, in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976) (age discrimination), the Fifth Circuit held:

> We emphasize safety in busing just as we would in a variety of other industrial areas where safety to fellow employees is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound. Priceless as is a single human life in our concept of the value of human life and our undoubted unwillingness ever to approve a practice which might kill one but not, say, twenty, we think the safety factor should be evaluated in terms of the possibility or likelihood of injury/death.

Other courts have exonerated physical fitness requirements for other employees responsible for the care and safety of passengers, such as airline pilots and flight attendants.[12] Not only physical requirements, but also academic achievement criteria may be proper when human risk is a factor, especially "in fields of scientific training in which risks to human life are involved." *Townsend* v. *Nassau County*

[12] *Boyd* v. *Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977) (pilots); *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (pilots); *Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (flight attendants); *Harriss* v. *Pan American World Airways, Inc.*, 437 F.Supp. 413, 435 (N.D. Cal. 1977) (flight attendants). *Cf. Florey* v. *Air Line Pilots Assoc., Int.*, 439 F.Supp. 165, 172 (D. Minn. 1977) (rejecting private cause of action for alcoholics).

Medical Center, 558 F.2d 117, 122 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (college degree requirement for blood bank technician not inherently discriminatory). As the Second Circuit stated in *Townsend*, "the relative function of the academic prerequisites to job-relatedness varies inversely with the risk to the health and safety of the public who depend upon the technology." *Id.* at 120.

Given the importance placed by the Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals on safety considerations in the above discrimination cases involving bus drivers,[13] flight attendants, and blood bank technicians, the Fourth Circuit's total disregard in the present case of the safety of the future patients is even more remarkable than its decision to disregard or reject an agency's interpretation and a district judge's fact findings, in order to arrive at its conclusion.[14]

[13] The New York courts have held that a hearing defect is related to ability to drive a school bus, and therefore a person with such a defect who applies for such a job is not covered by that state's Human Rights Law. *State Division of Human Rights* v. *Averill Park Central School District*, 59 A.D.2d 449, 399 N.Y.S.2d 926 (1977).

[14] One state court, dealing with a state handicap discrimination law in a case which did not involve a question of the safety of patients or customers, held that the Oregon statute imposes "upon an employer the obligation not to reject a prospective employee because of a physical or mental handicap unless there is, because of the defect, a probability [not merely a "reasonable possibility"] either that the employee cannot do the job in a satisfactory manner or that he can do so only at the risk of incapacitating himself." *Montgomery Ward & Co.* v. *Bureau of Labor*, 280 Or. 163, 570 P.2d 76 (Or.Sup. Ct. 1977). Leaving aside the question of the court's

As the Seventh Circuit emphasized in *Hodgson* v. *Greyhound Lines, Inc., supra,* and the Fifth Circuit stressed in *Usery* v. *Tamiami Trail Tours, Inc., supra,* where there is evidence of even a mere possibility that human life might be jeopardized by removing a qualification for employing persons entrusted with the care of others' lives, courts should not tamper with the employer's standards. Courts should be especially hesitant to substitute their judgments about the existence of such a possibility for the professional judgment of the staff of a hospital or nursing school.[15] This Court has expressed its concern for "maximum safety for the patient" in another context as follows:

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.

Roe v. *Wade,* 410 U.S. 113, 150 (1973). Furthermore, a hospital is under a duty "to exercise reasonable care to safeguard the patient from any known or reasonably apprehensible danger from himself and to exercise such reasonable care for his safety as his mental and physical condition, if known, may require," [16] and situations are not difficult to foresee in which a nursing employee without the ability to hear would simply not become aware of the audible indications of self-destructive tendencies of a disturbed patient, or of the symptoms of other patients. *See, e.g.,* 42 C.F.R. § 405.127(c)(1)(i) [HEW regulation for Medicare program which defines "skilled nursing services"].

The uncontradicted testimony in this record shows that there are many situations in which a nurse with a severe hearing deficiency like that of Ms. Davis would not be able to assure the safety of the patient, to observe and assess the total needs of the patient, or to provide unerringly timely treatment and other direct services to the patient. The decision of the court of appeals ignored these considerations and should therefore be reversed. Unless such reversal occurs, the decision below could result in the courts disregarding legitimate considerations of safety and efficiency that would appear in other factual contexts.

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unjustifiable disregard of the safety of the employee himself, it is clear from *Hodgson* and *Brennan* that the federal courts have rejected this sort of "preponderance of the evidence" approach to justifying physical job requirements in favor of a "possibility" test where safety factors are involved. The *Hodgson* court remarked that Greyhound need not "experiment with the lives of passengers." 499 F.2d at 865.

[15] *Cf. Fitzgerald* v. *Porter Memorial Hospital,* 523 F.2d 716 (7th Cir. 1975) (Stevens, J.) (upholding hospital rule excluding expectant fathers from delivery room for safety reasons despite differences in medical opinion as to existence of safety risks). *See also Furnco Construction Corp.* v. *Waters,* —— U.S. ——, 98 Sup. Ct. 2943, 2950 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

[16] *Bornmann* v. *Great Southwest General Hospital, Inc.,* 453 F.2d 616, 621 (5th Cir. 1971).

II. The court of appeals erroneously held that Section 504 imposes an obligation to undertake "affirmative conduct" on behalf of the handicapped.

Section 504 merely requires that recipients of federal financial assistance not discriminate against otherwise qualified handicapped individuals solely on the basis of their handicap. Section 504 does not contain any requirement to make "reasonable accommodations" to the needs of an "otherwise qualified handicapped individual." HEW, however, has promulgated a regulation under Section 504 which purports to impose such a requirement on recipients with respect to their employment practices, 45 C.F.R. § 84.12, and a number of other regulations, *e.g.*, 45 C.F.R. § 84.22 (modification of existing facilities), § 84.23 (new construction), and § 84.44(d) (auxiliary aids), which will require, according to HEW's own estimate, an expenditure of at least $3.2 *billion* annually on behalf of handicapped individuals by institutions which participate in federally-funded programs.[17] Thus, on the basis of a one-sentence statute prohibiting "discrimination," HEW has mandated extremely expensive preferential treatment.

However, neither 45 C.F.R. § 84.12 (employment practices), which purports to govern Southeastern's treatment of student trainees, nor any regulation requiring accommodations (such as auxiliary aids and program and facility modifications) is authorized by

[17] *See* O'Neill, Discrimination Against Handicapped Persons—The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance (May 4, 1977) (unpublished report prepared for the HEW Office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77), p. 65.

the statute. To the extent "reasonable accommodation" would cause a recipient to incur more than a negligible expense,[18] the requirement is preferential rather than non-discriminatory. HEW's regulations thus not only exceed the statute's mandate; they violate it. These regulations unlawfully attempt to bootstrap a failure to make preferential accommodations into discrimination[19]—whereas, in the absence of a finding of illegal discrimination, there cannot possibly arise any statutory duty to implement preferential remedies.[20]

[18] The Fourth Circuit noted that such accommodation could "become expensive." 574 F.2d at 1162.

[19] HEW's definitional legerdemain is remarkable. The initial version of the regulations defined "qualified handicapped person" as "with respect to employment, a handicapped person who can perform the essential functions of the job in question." Proposed 45 C.F.R. § 84.3 (k)(1), 41 Fed. Reg. at 20305 (1976). The next draft added the phrase "with reasonable accommodation," 41 Fed. Reg. at 29561, so that the final regulation reads: "with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 42 Fed. Reg. at 22680. Such administrative dilution of the statutory requirement that the individual be qualified before he comes within the protection of Section 504, much less before any accommodations are considered, is unjustified—as is the attempt to redefine qualification to encompass only the "essential functions," rather than all functions, of the job. In the 1978 amendments Congress rejected the "essential functions" approach at least insofar as alcoholics and drug abusers are concerned, by making it explicit that such persons are not covered by the Act if their condition prevents them "from performing the duties of the job in question." P.L. 95-602, 92 Stat. 2983, Section 122 (Nov. 6, 1978).

[20] *See, e.g., Furnco Construction Corp.* v. *Waters, supra,* at 2950. ("Title VII forbids [the employer] from having as

In the first section of this brief it was shown that the Fourth Circuit incorrectly failed to give weight to HEW's interpretation of the statutory language "otherwise qualified." The regulations now under consideration, however, neither are authorized by Section 504, nor further its nondiscrimination mandate. Nor does the "reasonable accommodation" regulation 45 C.F.R. § 84.12, promulgated only 22 months ago, on May 4, 1977, represent a consistent longstanding interpretation of Section 504's requirements.[21] Thus, this Court's recent comments in *International Brotherhood of Teamsters* v. *Daniel*, —— U.S. ——, 47 U.S.L.W. 4135, 4138 n.20 (1979), are directly in point:

> It is a commonplace in our jurisprudence that an administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight. . . . This deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time. But this deference is constrained by our

a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.").

[21] The "reasonable accommodation" requirement does not appear in, and would appear to be inconsistent with, the Veterans Administration guidelines, 38 C.F.R. § 21.70(c)(2)(1976), to implement statutes designed to restore private employability "to the extent consistent with the degree of disablement, lost by virtue of a handicap due to service-connected disability." 38 U.S.C. § 1501(2) (1970).

> obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.

The clear meaning of Section 504 is to prohibit discrimination, not to mandate preferences. Section 504 contains no language which would require the estimated $3.2 billion annual expenditure which HEW seeks to impose on recipients. The Fourth Circuit's summary conclusion that a "requirement of affirmative conduct" [22] is justified "even when such modifications become expensive," 574 F.2d at 1162, disregards the "language, purpose and history" of Section 504.

This Court previously has had occasion to construe a requirement of reasonable accommodation for religious practices imposed by the 1972 amendments to Title VII of the Civil Rights Act of 1964. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), the provision at issue was 42 U.S.C. § 2000e(j):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or

[22] The phrase "affirmative conduct" is a rather imprecise judicial hybrid. It is unnecessary in this case to compare the concept of reasonable accommodation, which appears in the regulations for Section 504, in the regulations for Section 503, and in the Title VII definition of religion, 42 U.S.C. § 2000e(j), with the concept of affirmative action, which appears in the text of Section 503, in the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2012(a), and in Executive Order No. 11246, all of which apply to federal contractors.

practice without undue hardship on the conduct of the employer's business.

Even in that context, where (unlike the situation under Section 504) Congress clearly placed a reasonable accommodation burden on employers, and First Amendment free exercise considerations might weigh on the side of a duty to accommodate, this Court held that an employer need not incur more than a *de minimis* cost[23] to accommodate the employee's religious practice. Anything beyond that would be unreasonable, or, differently stated, would constitute an undue hardship on the employer.

In *Hardison* this Court questioned whether, prior to the 1972 amendments, the EEOC had authority to issue a "reasonable accommodation" regulation at all under Title VII's mere prohibition of discrimination on the basis of religion. 432 U.S. at 76 n.11 (1977). The Court mentioned several cases holding that there was no duty to accommodate prior to the enactment of 42 U.S.C. § 2000e(j), and found the EEOC regulation "defensible" in retrospect only because a subsequent Congress amended Title VII itself to require

[23] *Hardison* held that the $150 cost of overtime wages to accommodate the employee for three months exceeded the *de minimis* standard. Lesser costs—indeed, any cost—may also constitute undue hardship on the employer. In *Fesel* v. *Masonic Home of Delaware, Inc.*, 447 F.Supp. 1346 (D. Del. 1978), the only reported case to analogize the *Hardison de minimis* concept into the area of sex discrimination, in the context of defining the extent of the burden on an employer to establish a bona fide occupational qualification defense, the court cited *Hardison* for the proposition that "where a duty of accommodation exists, it nevertheless falls short of requiring the employer to sacrifice either efficiency or wages to accommodate the employee." *Id.* at 1354 n.12.

reasonable accommodation short of undue hardship for the religious (and no other) needs of employees. *Id.* It is important to note that though Congress amended Section 504 in 1978 and adopted HEW's view of the limited application of Section 504 to drug abusers and alcoholics, it did not adopt HEW's interpretations of Section 504 to require reasonable accommodations in the employment context or other expenditures by recipients in non-employment contexts. Insofar as the regulations purport to require such accommodations or expenditures or other "affirmative conduct," therefore, they exceed HEW's authority and cannot be relied upon to support the Fourth Circuit's decision below.

III. The Court should not imply an additional private judicial remedy under Section 504, beyond the right to seek judicial review of adverse agency action.

The single sentence of Section 504 does not explicitly bestow on anyone a right to bring suit in federal court. Because of the similar wording of Section 504 to that of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*,[24] the issues of whether private causes of action may be judicially implied under each of

[24] Two important differences between Section 504 and both Titles VI and IX are that Section 504 explicitly protects only *qualified* handicapped individuals and only prohibits discrimination *solely* on the basis of a handicap. In addition, because handicaps differ widely in nature and degree of severity, there are unique substantive problems with the very concept of "handicap discrimination," in contrast to the traditional contexts of discrimination based on race or sex. *See infra*, Section III(B).

these statutes, according to the standards of *Cort* v. *Ash*, 422 U.S. 66 (1975), are closely related. The Title IX implication issue, of course, is currently under consideration in the case of *Cannon* v. *University of Chicago*, No. 77-926, in which EEAC has also filed a brief as *amicus curiae*.

If a right of action of the type asserted by Ms. Davis were implied under Section 504, the potential plaintiffs would include an indiscernible and possibly vast number of persons whose characteristics are only vaguely defined by the Rehabilitation Act, 29 U.S.C. § 706(6) (Supp. V 1975). No one is a perfect physical or mental specimen. Although not all citizens are in fact handicapped individuals who are qualified for particular programs or jobs, many allegations to that effect would be likely to survive a motion to dismiss and necessitate voluminous discovery and lengthy trials. *See, e.g., Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Such a staggering judicial expansion of federal jurisdiction must be precluded by a proper construction in this case of the language, history and purpose of Section 504.

A. ***Nothing in the legislative history of the Rehabilitation Act of 1973 or its two amendments supports the implication of a right of action under Section 504 for private individuals against private recipients of federal funds, but much supports the restriction of judicial participation in enforcement to a limited review of administrative proceedings in suits against the Department of Health, Education and Welfare.***

Section 504 as originally enacted in 1973 had only one sentence of legislative history, which referred to

the provision as a mere policy proclamation.[25] The portions of the legislative history of the 1974 Amendments to the Rehabilitation Act that were quoted extensively in *Lloyd* v. *RTA*, 548 F.2d 1277, 1285-86 (7th Cir. 1977), and mentioned in Mr. Justice Stevens' opinion in *Regents of the University of California* v. *Bakke*, —— U.S. ——, 98 S.Ct. 2733, 2815 n.27 (1978), show that Congress intended the enforcement provisions for Section 504 to be patterned after the Title VI regulations, 45 C.F.R. Parts 80 and 81, which neither provide nor contemplate a private cause of action for alleged victims of discrimination against alleged violators. Senate Report No. 93-1297[26] includes the following sentence:

> This approach to implementation of section 504, which closely follows the models of [Title VI and Title IX], would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

The *Lloyd* court expressly stated that this last phrase "contemplates judicial review of an adminis-

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[25] S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2123, stated: "The bill further includes a provision proclaiming a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." *See Snowden* v. *Birmingham-Jefferson County Transit Auth.*, 407 F.Supp. 394, 397 (N.D. Ala. 1975), *aff'd.*, 551 F.2d 862 (5th Cir. 1977).

[26] 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391.

trative proceeding as contradistinct from an independent cause of action in federal court," 548 F.2d at 1286. The entire passage from the Senate Report is a directive to the Department of Health, Education and Welfare to enforce Section 504 as it was already enforcing Title VI and Title IX. If HEW should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be HEW, not the recipient of federal funds,[27] and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole. *See Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

The legislative history of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978[28] confirms that alleged discriminatees may not enter federal court except to

[27] The Administrative Procedure Act, 5 U.S.C. §§ 701-706, providing for judicial review of agency action, allows suits against agencies but not private parties. *See, e.g., Thomas* v. *DeVilbiss*, 408 F.Supp. 1357 (D. Ariz. 1973). Thus, persons alleging a failure of an agency to eradicate discrimination by the regulated entities must file suit against the agency, as in *NAACP* v. *Federal Power Comm.*, 425 U.S. 662 (1976), not against the regulatee. The courts have long recognized the "merit in confining [Title VI] litigation to the public agencies." *Taylor* v. *Cohen*, 405 F.2d 277, 283 (4th Cir. 1968).

[28] P.L. 95-602, 92 Stat. 2955, 2982, 2984.

seek review of adverse administrative action pursuant to the Administrative Procedure Act. Though Section 120(a)(1) of those Amendments explicitly grants a private right of action to alleged victims of handicap discrimination in federal employment, Section 120(a)(2) rejects that approach for Section 504 complainants and instead merely codifies the HEW regulation, 45 C.F.R. § 84.61, which made available to Section 504 complainants the procedures of Title VI —which, again, do not provide for or contemplate a private cause of action for alleged victims of discrimination directly against alleged violators. Section 120(b) of the Amendments then provides for discretionary awards of attorney's fees to a prevailing party "in any action or proceeding to enforce or charge a violation of" Section 504. This provision refers to administrative proceedings pursuant to the incorporated Title VI regulations, together with the limited judicial review authorized by Title VI itself, 42 U.S.C. § 2000d-2. Like the portion of the legislative history of the 1974 amendments which was construed by the Seventh Circuit in *Lloyd*, these provisions of the 1978 amendments contemplate "judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286.

Nothing in the legislative history of the 1978 amendments indicates otherwise. Neither Senator Cranston, 124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978) nor Senator Stafford, 124 Cong. Rec. S18999 (daily ed. Oct. 14, 1978) indicated that the new Section 504 provisions contemplated anything more than the existing right to seek judicial review of administrative action. To the contrary, Senator Cran-

ston clearly distinguished the provisions of the Amendments applicable to Section 504 from those applicable to Section 501, which explicitly extended Title VII rights and remedies—and exhaustion requirements—to qualified federal employees who are victims of handicap discrimination. Congress obviously knew how to create an independent judicial remedy for persons covered by Section 504, but again refused to do so, just as it had so often in the past rejected similar proposals in the form of amendments to Title VII. *See* Exhibit "A."

In sum, there is no evidence whatsoever in Section 504's history of a Congressional intent to provide for the type of private suit for damages and injunctive relief against a private university which the court of appeals permitted in this case. The 1978 amendments, like the passage from the history of the 1974 amendments which was discussed in *Lloyd*, can be read in no other way than to restrict the scope of judicial participation in Section 504 enforcement to a limited review of administrative proceedings. In other words, Congress intended to foreclose private litigation about alleged handicap discrimination by recipients of federal financial assistance until a final agency determination has been made. Congress is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers" [29] contained in Title VI and incorporated by reference (in the 1974 Senate Report and in Section 120 of the 1978 amendments) into Section 504. This Court has

[29] *See Brown* v. *GSA*, 425 U.S. 820, 823 (1976).

never demanded that Congress insert into a statute or its legislative history a sentence to the effect that "no court shall imply any additional remedies hereunder" as a precondition to its refusal to "expand the coverage of the statute to subsume other remedies." [30]

B. *Implication of a private right of action under Section 504 would interfere with the legislative purposes of the Rehabilitation Act.*

The Rehabilitation Act of 1973, as amended, is not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped—especially severely handicapped—individuals and developing new programs to assist in their integration into society. There is no indication in the text or legislative history of the Rehabilitation Act or its two amendments that anyone other than the federal government must bear the expense for these subsidies and programs. Appropriations under the Rehabilitation Act for fiscal year 1973 were estimated by the Senate to be $698 *million.*[31] It is inconceivable that by including the one-sentence policy statement of Section 504 Congress intended *sub silentio* to impose on recipients of federal financial assistance (not earmarked to pay accommodation costs) a multi-*billion* dollar burden [32] to restructure American educational and industrial facilities and practices to accommodate "otherwise qualified handicapped individuals."

[30] *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[31] S. Rep. No. 93-318, *supra*, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS at 2124.

[32] *See* p. 22 & n.17, *supra*.

It likewise stretches credulity to believe that Congress also intended for all who fit within the definition of 29 U.S.C. § 706(6) to be able to use the federal courts to force recipients to make and bear the expense of such accommodations. That definition is intentionally broad to ensure that no worthy person is denied access to the federally assisted programs, not to maximize the pool of potential plaintiffs for judicially-invented lawsuits.

Because the concept of handicap discrimination is novel and complex, Congress has consistently refused to amend Title VII, which includes explicit rights to sue, to include handicap as an additional prohibited ground of discrimination.[33] Judicial implication of a private right to sue under Section 504 would defeat the legislative purpose that, before federal courts become involved, HEW be given a chance, within the legal confines of its statutory mandate, to explore alternative ways of aiding qualified handicapped individuals to participate in programs which are federally financed. This is no simple task, as former HEW Secretary Mathews explained in a letter accompanying the publication of the initial version of the proposed Section 504 regulations:

> Section 504, however, differs conceptually from both titles VI [of the Civil Rights Act of 1964] and IX [of the Education Amendments of 1972]. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504 questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.[34]

Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 706(6) (Supp. V 1975), is so broad that discrimination would have to be defined in terms of disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

Congress showed its caution in this new field by limiting the application of Section 504 to "otherwise qualified handicapped individuals" who face disparate treatment "solely" on the basis of handicap, and by rejecting attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground

[33] *See* Exhibit "A."

[34] 41 Fed. Reg. at 20296 (1976).

of discrimination.[35] And by incorporating the procedures and remedies of Title VI, with their explicit exclusion of employment practices from coverage, into Section 504, Congress showed that it did not wish for employment discrimination lawsuits to arise under Section 504. *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 18 F.E.P. Cases 1141 (4th Cir. 1978). In fact, regulation of employment practices, such as the nursing apprenticeship in this case, is an area in which the courts have been particularly averse to the implication of private judicial remedies under federal statutes and executive orders.[36] Judicially created employment litigation under the Rehabilitation Act would present, in the words of the court in *Lloyd* v. *RTA*, *supra*, 548 F.2d at 1286, "the unseemly vista of a spotty application of *ad hoc* remedies in lawsuits in various regions of the country." In view of the cautious approach of Congress in this new area, and because Congress chose to establish an administrative scheme for handling these claims, rather than to provide for private causes of action, this Court should not create a direct judicial forum for resolving these complicated problems.

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[35] See Exhibit "A" hereto, and *Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. 200 (N.D. Tex. 1977), *appeal pending*, No. 77-2443 (5th Cir.) (no implied private right of action under Section 503). *Accord, Wood* v. *Diamond State Telephone Co.*, 440 F.Supp. 1003 (D. Del. 1977); *Moon* v. *Roadway Express, Inc.*, 439 F.Supp. 1308 (N.D. Ga. 1977), *appeal pending*, No. 77-3263 (5th Cir.).

[36] *See, e.g.*, the cases collected in *Rogers* v. *Frito-Lay, Inc.*, *supra*, 433 F.Supp. at 202 n.1.

IV. A claimant must exhaust available remedies with the Department of Health, Education and Welfare before filing suit in federal court.

The present case does not directly raise a question of exhaustion of remedies with an administrative agency. At the time Ms. Davis filed her suit, HEW had not promulgated its final Section 504 regulations, which incorporate the Title VI procedures, 45 C.F.R. § 84.61, nor had Congress explicitly incorporated the Title VI procedures into the statute itself, as it did in 1978. The district court found that Ms. Davis had amply pursued her remedies with the college itself, and the court of appeals agreed. The court of appeals recommended, however, that the district court on remand consider the issues of exhaustion and primary jurisdiction. The EEAC does not take a position about whether administrative exhaustion should be required of this particular plaintiff, if she otherwise has a right to be in federal court, because the record does not show what remedies were in fact available from HEW prior to May 4, 1977, when the HEW regulations were issued. Subsequent claimants, however, must be required to exhaust the Title VI remedies provided by the HEW regulations.

It has long been established that no one can bring any kind of suit under Title VI without first exhausting administrative remedies under 42 U.S.C. § 2000d-2. *Green Street Association* v. *Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).[37] Title VI is the model statute for Section

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[37] Accord, *Cave* v. *Beame*, 433 F.Supp. 172, 174 (E.D.N.Y. 1977); *Johnson* v. *County of Chester*, 413 F.Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green* v. *Cauthen*, 379 F.Supp. 361, 378

504, and its remedial provisions were in 1978 explicitly incorporated by Congress into Section 504. The statutory schemes for Title VI and Section 504 contain a "careful blend of administrative and judicial enforcement powers," *see Brown* v. *GSA*, *supra*, 425 U.S. at 832-33. The Title VI exhaustion requirement applies alike to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School Dist. of City of Saginaw, Michigan* v. *HEW*, 431 F.Supp. 147 (E.D. Mich. 1977). Furthermore, a complainant must *fully* exhaust administrative remedies. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-68 (1947).[38]

The 1978 amendment to Section 504 shows that Congress intended that Title VI's explicit remedies and the body of law establishing the prerequisites to such remedies to be carried over into the area of handicap discrimination under Section 504. Title VI's exhaustion requirement should therefore be applied to all persons attempting to assert a Section 504 claim after May 4, 1977. *See, e.g., Doe* v. *New York University*, 442 F.Supp. 522 (S.D.N.Y. 1978).

Ms. Davis herself should also be required to pursue her claims, if any, with HEW, but pursuant to the

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(D.S.C. 1974); *Feliciano* v. *Romney*, 363 F.Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree* v. *City of Chattanooga*, 362 F.Supp. 1136, 1141-42 (E.D. Tenn. 1973).

[38] The doctrine of exhaustion of remedies applies to constitutional as well as statutory civil rights claims. *See, e.g., Lance Roofing Co.* v. *Hodgson*, 343 F.Supp. 685 (N.D. Ga.) (3-judge court), *aff'd*, 409 U.S. 1070 (1972); *Torres* v. *Taylor*, 456 F.Supp. 951 (S.D.N.Y. 1978).

doctrine of primary jurisdiction. If she were to be thought to have a light to be in federal court at all under the standards of *Cort* v. *Ash*, and she had exhausted whatever remedies were available to her within the College and with HEW, the doctrine of primary jurisdiction requires nonetheless that the complicated factual issues involved in her claim be considered and determined by HEW in the first instance. Meanwhile, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64 (1956).[39] This doctrine has already been applied to Section 504 claims by at least one district court, *Crawford* v. *University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C. 1977). It is particularly appropriate to the complex area of handicap discrimination.[40]

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[39] *See also Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 469-70 (1959); *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412, 417-419 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Usery* v. *Tamiami Trail Tours, Inc., supra*, 531 F.2d at 239-48 (Brown, J., concurring); Jaffe, "Primary Jurisdiction," 77 Harv.L.Rev. 1037 (1964).

[40] *See, e.g.*, former HEW Secretary Mathews' comments at 41 Fed. Reg. at 20296 (1976), quoted in Section III(B), *supra*.

V. Conclusion

In this case, the Court is presented for the first time with several extremely important substantive and procedural issues in the new area of handicap discrimination. The EEAC respectfully submits that the decision of the court of appeals should be reversed, and that this Court's opinion should make it clear that Section 504 does not interfere with legitimate business necessity requirements such as safety or efficiency, does not require preferential accommodations, does not give rise to an implied private right of action, and does provide administrative remedies which must be exhausted before a federal court may review a claim of handicap discrimination under Section 504.

Respectfully submitted,

SUSAN A. CAHOON
WILLIAM A. WRIGHT
KILPATRICK, CODY, ROGERS,
McCLATCHEY & REGENSTEIN
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 572-6500

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

Of Counsel:

DOUGLAS S. McDOWELL
McGUINESS & WILLIAMS
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 296-0333

EXHIBIT A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964 to Add Handicap as a Prohibited Ground of Discrimination

93d Congress (1973-74)

Bill	Sponsor
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

94th Congress (1975-76)

Bill	Sponsor
S. 1311	Pell
S. 1757	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4624	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

95th Congress (1977-78)

Bill	Sponsor
S. 1477	Weicker
H.R. 264	Conte
H.R. 461	Le Fante
H.R. 1107	O'Brien
H.R. 1200	Rodino
H.R. 1995	Roybal
H.R. 3504	Edwards
H.R. 6619	Beard
H.R. 9477	O'Brien & 2 others
H.R. 9521	O'Brien & 15 others
H.R. 10198	O'Brien & 6 others

96th Congress (1979)

Bill	Sponsor
H.R. 373	Guyer
H.R. 609	O'Brien

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA AND THE STATES OF ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the
Commonwealth of Massachusetts

J. MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

ROBERT K. CORBIN
Attorney General of Arizona
200 State Capitol Building
Phoenix, Arizona 85007
Attorney for the
State of Arizona

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the
State of Connecticut

(Counsel continued inside front cover)

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In The
SUPREME COURT OF THE UNITED STATES

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

vs.

FRANCES B. DAVIS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE AMERICAL CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHER CALIFORNIA, AMICI CURIAE

Interest of Amici Curiae */

The American Civil Liberties Union is a nationwide, non-partisan organization of two hundred thousand members, dedicated to defending the principles embodied in the Bill of Rights to the Constitution. The New York Civil Liberties Union and the American Civil Liberties Union of Southern California are state affiliates of the ACLU, operating in New York State and Southern California, respectively.

The ACLU and its affiliates have a deep interest in protecting the Constitutional and statutory rights of handicapped individuals, including rights secured by the Rehabilitation Act of 1973, 29 U.S.C. 794. In the belief that judicial enforcement can best secure the rights of handicapped individuals, the ACLU has represented developmentally disabled plaintiffs in the Willowbrook case, NYSARC v. Carey, 393 F.Supp. 715 (E.D.N.Y. 1975), and petitioner in Trageser v. Libbie Rehabilitation Center, Inc., cert. granted, 78-1454, among others.

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*/ Consents to the filing of a brief Amicus Curiae have been obtained from all parties and have been lodged with the Clerk's office.

This case raises important questions concerning the ability of handicapped persons to make the rights secured by the Constitution and the Rehabilitation Act a reality. For good reason, courts rather than administrative agencies have been the primary guarantors of such important personal rights. Amici submit this brief in support of the traditional role of the courts in vindicating civil rights.

STATEMENT OF THE CASE

Respondent Frances Davis, an individual with a hearing disability, sought and was denied admission to the Associate Degree Nursing Program offered by petitioner Southeastern Community College. After unsuccessfully seeking reconsideration of that denial by the college President, an informal review procedure provided by the college, Ms. Davis filed a civil action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and 42 U.S.C. §1983, alleging discrimination in admission on the basis of her hearing disability.

The trial court upheld respondent's right to maintain the action without exhaustion of further administrative remedies, 424 F. Supp. 1341 (E.D.N.C. 1976). However, the court held that although respondent is a "handicapped person" within the meaning of 29 U.S.C. §706(6), the college's actions did not constitute discrimination. On appeal, a panel of the Fourth Circuit unanimously affirmed the district court's holding as to the private right of action and exhaustion issues, and remanded on the merits of the claim itself for consideration by the district court of recently promulgated regula-

tions implementing Section 504. A petition for rehearing and suggestion for rehearing en banc were subsequently denied without opinion. 574 F.2d 1158, 1163.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici have special experience and expertise in two of the questions for which the Court granted certiorari in this case - whether §504 of the Rehabilitation Act of 1973 confers a private right of action and whether administrative exhaustion is required, at least under the circumstances presented here. Amici's brief is therefore limited to a discussion of these two important points.

Section 504 confers a private right of action on aggrieved handicapped individuals to secure rights guaranteed by the Act. The existence of a private right of action is fully consistent with the standards enunciated by this Court in Cort v. Ash, 422 U.S. 66 (1975), and has been recognized by virtually all federal courts to consider the issue. (Point I)

The Court of Appeals was correct in ruling that administrative exhaustion was not required under the circumstances of this case. The weight of decisional law supports that conclusion (IIA). The administrative process is directed toward the termination of federal funds for systematic non-compliance, and is not designed or implemented to redress specific deprivations of individual rights (IIBi). Moreover, because H.E.W. is currently faced with severe delays in investigating and processing individual complaints, exhaustion

of the administrative process is presently futile, as even H.E.W. concedes (IIBii).

ARGUMENT

I. SECTION 504 OF THE REHABILITATION ACT OF 1973 MAY BE ENFORCED BY A PRIVATE RIGHT OF ACTION.

By enacting the Rehabilitation Act of 1973, Congress intended to make "participation in society more feasible for handicapped individuals." 1973 U.S. Code Cong. & Adm. News 2092. Virtually every federal court to consider the question presented here has concluded that a private right of action on behalf of handicapped individuals against those who have discriminated on the basis of handicap is both necessary and proper "and intended" under §504 of the Rehabilitation Act. That conclusion, endorsed by the Fourth Circuit in this case, 574 F.2d at 1159, is entirely consistent with the reasoning of this Court's decision in Cort v. Ash, 422 U.S. 66 (1975), where the standards for implying rights of action were set forth.

A. The Lower Federal Courts Are In Virtually Unanimous Agreement That §504 May Be Enforced By A Private Right Of Action.

The federal courts have from the outset construed §504 of the Rehabilitation Act of 1973, 29 USC §794, to create a private right of action. In the earliest cases, most courts simply assumed the existence of such a right. See e.g. Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976); Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975). Indeed, the district court did the same here. With the passage of time this unstated assumption has been more frequently made explicit after careful analysis of legislative history and relevant decisional law.

Sites v. McKenzie, 423 F. Supp. 1970 (N.D.W.Va.1976), was the first case expressly to recognize a private right of action under §504. In Sites, plaintiff asserted that defendants' denial of vocational rehabilitation opportunities to mentally ill prisoners violated the anti-discrimination strictures of §504. The court granted plaintiff's motion for summary judgement stating that §504 "... provides a cause of action for any discrimination on the basis of such handicap..." 423 F.Supp. at 1197.

Sites was followed by Lloyd v. Illinois Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977), which based its conclusion that a private right of action could be implied under §504 upon a detailed analysis of this Court's decisions on implied rights of action. Lloyd's holding has been adopted by every circuit court which has since considered the issue. See Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir.1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Leary v. Crapsey, 566 F.2d 863 (2nd Cir.1977); Davis v. Southeastern Community College, 574 F.2d 1178 (4th Cir.1978); see also Gurmankin v. Costanzo, 556 F.2d 184 (3rd Cir.1977), Coleman v. Darden, 47 U.S.L.W. 2583 (10th Cir. Feb. 23, 1979).1/

1/ Most District Courts passing on the question have recognized a private right of action under Section 504. See Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis.1977); Drennon v. Philadelphia General Hospital, 428 F. Supp. 809 (E.D. Pa. 1977); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); Vanko v. Finley, 440 F. Supp. 656 (N.D. Ohio 1977); Jayne v. University of Nevada, Reno, No. R-76-183

In determining that a private right of action was appropriate under Section 504, the Lloyd court first noted the near identity of language in §504 and Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d.2/ Recognizing that the practice under Section 601 would bear heavily on plaintiffs' right to bring a private action pursuant to Section 504, the court then reviewed the practice under Title VI and discussed Lau v. Nichols, 414 U.S. 563 (1974), in which this Court recognized a private action under Title VI and permitted private persons to

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1/(cont'd)
BRT (D. Nev. June 10, 1977); Michigan Paralyzed Veterans of America v. Coleman, 451 F.Supp. 7 (E.D. Mich. 1977); Halderman v. Pennhurst, 466 F.Supp. 1295 (E.D.Pa. 1977); Simon v. St. Louis County, Missouri, No. 77-1140 C.(4) (E.D. Mo. Jan. 31, 1978); Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978); Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); cf. Rogers v. Frito-Lay, 433 F. Supp. 200 (N.D. Tex. 1977) (private right of action upheld, but §504 held not to apply to mere government contractors). Contra, Doe v. New York University, 442 F. Supp. 522 (S.D.N.Y. 1978).

2/ Section 504 is patterned after, and is almost identical to the anti-discrimination language of Section 601, 42 U.S.C. §2000d, which provides:

> "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in,

challenge the failure of the San Francisco School District to offer classes in the Chinese language to Chinese speaking children.3/ The court found Lau "dispositive" in support of the private right of action. The court in Lloyd further noted that the regulations implementing Section 504 established affirmative individual rights which further supported a private cause of action under this Court's Lau analysis. Lloyd, supra at 1280, 1281.4/

2/ (cont'd)
> be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Moreover, §505 of the Act, which was added in the 1978 amendments, Pub.L.95-1149, now expressly provides:

> "The remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal Assistance or Federal provider of such assistance under Section 504 of this Act."

The regulations promulgated by HEW to implement §504 are similarly explicit. Under 45 C.F.R. §84.61, "The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 [45 C.F.R. §80.6 and 45 C.F.R. Part 81] apply to this part."

3/ The lower federal courts have agreed that a private fight of action should be implied under §601. See, e.g., Bossier Parish School Board v. Leman, 370 F.2d 847, 852 (5th Cir.), cert. denied, 388 U.S. 911 (1967); Flanagan v. President and Directors of Georgetown College,

4/ SEE next page.

Additionally, the Lloyd Court found support for a private right of action under Section 504 by reference to Cort v. Ash, supra, 422 U.S. 66 (1975). In Cort, this Court listed four factors for determining whether a private remedy is implicit in a statute silent on the subject:

> First, is the plaintiff "one of the class for whose special benefit that statute was enacted" - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the

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3/ (cont'd) 417 F. Supp. 377 (D.D.C. 1976); Laufman v. Oakley Building & Loan Co.,408 F. Supp. 489, 498-499 (S.D. Ohio 1976); Natonabah v. Board of Education, 355 F. Supp. 716, 724 (D.N.M. 1973). In Regents of the University of California v. Bakke, 98 S.Ct. 2733(1978), decided since Lloyd, four Justices of this Court found an implied right of action under Title VI; four others assumed it for purposes of that case.

4/ The Lau Court had relied heavily on the existence of administrative regulations to support a private cause of action. 414 U.S. at 567-568.

> concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78. (citations omitted)

Applying this test, the Lloyd court concluded that the plaintiffs met the standards set forth in Cort for a private action, because, as persons whose mobility was impaired, the plaintiffs were among the class "for whose special benefit" Section 504 had been enacted. The Lloyd court further found a strong indication of Congressional intent to create a private remedy citing a Senate Labor and Public Welfare Committee report which noted that Section 504 "...was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964..." S. Rep.No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). The Senate Labor and Public Welfare Committee noted (id. at 40) that "section 504, which closely follows the models of the above-cited anti-discrimination provisions, would "...permit a judicial remedy through a private action."5/ The Court also concluded that implying a private remedy for plaintiffs was consistent with a primary purpose under-

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5/ As already noted, a number of federal courts had ruled or implied that §601 of the Civil Rights Act of 1964 created a private right of action by the date of the just-quoted Senate Report. See Serna v. Portales Municipal Schools, 499 F.2d 1147 (9th Cir. 1974); Cypress v. Newport News General and Nonsectarian Hospital Ass'n., 375 F.2d 648 (4th Cir. 1967); Marable v. Alabama Mental Health Board, 297 F. Supp.291 (M.D. Ala.1969). These decisions were certainly known to Congress when it analysed §504 to Title VI.

lying the Rehabilitation Act. in this case statutory and regulatory standards regarding barrier-free construction of public facilities.6/ Finally, the court recognized that affording plaintiffs a private remedy to vindicate the transportation needs of the disabled would not encroach upon an area traditionally relegated to state law. The Court concluded, "Because all four Cort tests are satisfied, we are reinforced in our holding that Section 504 implicitly provides a private remedy." Lloyd, supra at 1287.

6/ In assessing this third element of the Cort test, one factor which courts have considered in the past is whether private suites "aided an otherwise overworked or inefficient administrative Agency." Johnston, "Private Rights of Action under Title IX, 13 Harv. C.R.C.L.L. Rev. 425, 444-445 (1978). See J.I. Case Co. v. Borak,377 U.S. 426 (1964); Like v. Carter, 448 F.2d 798 (8th Cir. 1971); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966); Sullivan v. Chase Inv. Servs., of Boston, Inc., 434 F. Supp. 171 (N.D.Cal.1977); Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D.Ind. 1976); National Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973); Common Cause v. Democratic National Comm., 333 F. Supp. 803 (D.D.C.1971). That is clearly the situation here, as described in Point II, infra. Significantly, "The Office for Civil Rights, as a matter of policy, believes that complainants should have a private right of action under Section 504 in federal courts..." Affidavit of Michael A. Middleton, Director, Division of Policy, Planning and Research of OCR, submitted in Whitaker v. Bd. of Higher Ed., 461 F.Supp. 99 (E.D.N.Y. 1978) (hereinafter "Middleton affidavit").

B. The 1978 Amendments To The Rehabilitation Act Reaffirm The Congressional Intention To Allow Private Enforcement of §504.

Developments since Lloyd affirm the correctness of that decision. Most importantly, in 1978 Congress amended the Rehabilitation Act to provide, inter alia, that courts may award attorneys' fees in "any action or proceeding to enforce or charge a violation of a provision of this title." P.L.95-602, §120(a), 92 Stat. 2983. As explained in the accompanying House Report, the purpose of this addition was to provide "attorneys' fees to successful parties in judicial actions to enforce the provisions of Title V." H.Rep. No. 95-1149, 1978 U.S. Code Cong. & Adm. News 7490, 7491 (emphasis added). The only possible interpretation of this unambiguous language is that the 95th Congress believed that a private right of action was available to enforce the substantive provisions of §504, and that it intended to assist such private enforcement.

In the discussion of the 1978 Amendments to the Rehabilitation Act, Senator Cranston, Chairman of the Subcommittee on Child and Human Development of the Committee on Human Resources, emphasized that the provision for allowance of attorneys' fees by a court "would be an important step in assisting all handicapped individuals in their struggle by permitting equal access to the courts to enforce the provisions of Title V of the Rehabilitation Act of 1973. 124 Cong. Rec. 15590 (Sept. 20, 1978). See also, S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). Senator Cranston emphasized that "the rights extended to handicapped individuals under Title V of the Rehabilitation Act of 1973. . . are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Private enforcement of

these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and that enforcement is uniform." 124 Cong. Rec. 15590 (Sept. 20, 1978).

Senator Bayh noted that the proposed 1978 Amendments were consistent with the initial intent of Congress when Title VI was first enacted in 1964 "to create a private right of action for aggrieved individuals. The Circuit Courts of the United States have clearly acknowledged this congressional intent. (Cases cited from the Fourth, Fifth and Eighth Citcuits omitted)" Id., at 15593.

Further colloquy between Senators Cranston and Bayh emphasized that one of the principal purposes of the passage of the Civil Rights Attorneys Fees Awards Act of 1976, Pub.L. 94-559 was "to encourage appropriate private litigants to bring actions under titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, id. at 15593, and similarly, that "an important reason" for what is now §505, "is to encourage appropriate private litigants to bring actions under Title V of the Rehabilitation Act." Id. Senator Cranston quoted again from the Congressional discussion of the 1974 Amendments to the Rehabilitation Act to stress that Section 504 would "permit a judicial remedy through a private action."

Finally, Senator Bayh concluded his discussion of the 1978 Amendments with the following observation:

> "I thank the distinguished Senator from California for taking time to make clear the continuing intention of Congress that private actions be allowed under titles VI and VII of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972 and title V of the Rehabilitation Act of 1973." Id. (emphasis added). 7/

In sum, a private right of action under Section 504 of the Rehabilitation Act has been endorsed by every Circuit Court of Appeals which has considered the issue. Moreover, these conclusions are consistent with the Supreme Court's standards regarding the appropriateness of private actions set forth in the Cort v. Ash decision, supra.

7/ This language becomes even more compelling when placed against the context of a body of developing case law which had already implied a private right of action under §504. Had Congress originally intended otherwise, it surely could have taken the opportunity presented by the comprehensive Rehabilitation Act Amendment of 1978 to halt that trend. Instead, as Senator Bayh's comments indicate, it confirmed that trend.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED UNDER §504 BECAUSE THE REGULATIONS DO NOT PROVIDE A MEANINGFUL ENFORCEMENT MECHANISM FOR THE VINDICATION OF PERSONAL RIGHTS.

A. Exhaustion of Administrative Remedies is Not Required Under §504 of the Rehabilitation Act.

Neither the language nor the legislative history of §504 specifically requires individual complainants to exhaust their administrative remedies prior to initiating litigation.

A considerable body of case law supports the view that exhaustion is not necessary in the §504 context. In Campbell v. Kruse, 434 U.S. 808 (1977), this Court vacated and remanded a lower court opinion which had been based on constitutional grounds "with directions to decide the claim based on the federal statute, §504 of the Federal Rehabilitation Act of 1973." Id. (emphasis added).

Plaintiff in that case had not exhausted administrative remedies, and this Court's ruling implicitly precluded any attempt to subject plaintiffs' claim to a requirement of prior administrative review.

Since then, other courts have been more explicit in reaching the same result. Most recently, Chief Judge Mishler ruled in Whitaker v. Board of Higher Education, 461 F.Supp. 99 (E.D.N.Y. 1978), that exhaustion is not required in §504 cases. Similarly, in Simon v. St. Louis County, C.A. 77-1140 C(4) (E.D. Mo. Jan. 31, 1978), the court refused to dismiss a §504 claim for failure

to exhaust administrative remedies. And in Michigan Paralyzed Veterans of America v. Coleman, 451 F.Supp. 7 (E.D. Mich. 1977), the doctrines of primary jurisdiction and administrative exhaustion were deemed inapplicable to §504 suits. Accord, Doe v. Grile, No. F 77-108 (N.D. Ind. Aug. 10, 1978).

In addition, numerous courts have directly addressed §504 claims, implicitly rejecting an administrative exhaustion requirement .7/

7/ Duran v. City of Tampa, 430 F.Supp. 75 (M.D. Fla. 1978) and 451 F.Supp. 954 M.D.Fla. 1978); Pedro v. Bishop, No. 78-083P N.D. ex. Feb. 21, 1978); Mattie T. v. Holladay, No. DC 75-31-5 (N.D. Miss. Oct. 28, 1977); Halderman v. Pennhurst, 466 F.Supp. 1295 (E.D. Pa. 1977); Vanco v. Finlay, 440 F.Supp. 656 (N.D. Ohio 1977); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Bartels v. Biernat, 427 F.Supp. 226 (E.D. Wis. 1975); Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976); Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975), aff'd per curiam, 551 F.2d 862 (5th Cir. 1977); Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W. Va. 1976); Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978); NYSARC v. Carey, No. 72-356, 357 (E.D.N.Y., orders issued Sept. 14, 1978 and Feb. 28, 1979). Contra, Doe v. Colautti, 454 F. Supp. 621 (E.D. Pa. 1978); Stubbs v. Kline, 463 F. Supp. 110 (W.D. Pa. 1978); Sherer v. Waier, 457 F. Supp. 1034 (W.D. Mo. 1978); Crawford v. Univ. of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); Drennan v.

This Court has decided two cases under Title VI of the Civil Rights Act of 1964, 8/ the administrative procedures of which are identical to those under §504, 9/ which imply that exhaustion is not required in Title VI cases.

In Lau v. Nichols, 414 U.S. 563 (1974), a unanimous Court held that Chinese-American students who had been denied an appropriate bilingual education by the San Francisco school system had a private right of action under Title VI. In remanding the case to the district court for further proceedings, there was no suggestion in the Court's opinion that it anticipated or intended that plaintiffs first exhaust whatever administrative remedies might have been available. Similarly, and more recently, eight of nine justices in Regents v. Bakke, ___ U.S. ___, 57 L.Ed. 2d 750 (1978), were willing to consider the merits of Bakke's Title VI claim although it is clear from the procedural history of the case, and indeed from Justice Powell's opinion, 57 L.Ed. 2d at 767, that Bakke had not pressed his assertion of reverse discrimination before HEW prior to initiating his action.

(footnote 7 cont'd.) Philadelphia Gen'l. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Doe v. New York University, 422 F. Supp. 809 (S.D.N.Y. 1978).

8/ 42 U.S.C. §2000d et seq.

9/ 45 C.F.R. 80.6-80.10. See §120(a) of the Rehabilitation, Comprehensive Services and Developmental Amendment of 1978 P.L. 95602, to be codified as 29 USC §794a(a)(2) (Title VI remedies and procedures applicable to §504 cases).

B. The Futility of Filing an Administrative Complaint with H.E.W. Renders Exhaustion Unnecessary.

It is a well-established principle of administrative law that exhaustion is not required if the only available administrative remedy is plainly inadequate. See generally Schwartz, Administrative Law 499 (1976); Jaffe, Judicial Controls of Administrative Action, 426-432 (1965). That principle has been recognized in §504 cases as elsewhere. Thus, in Lloyd v. Regional Transportation Authority, 548 F. 2d 1277, 1286 (7th Cir. 1977), the Seventh Circuit noted that the doctrine of exhaustion presupposes the presence of ". . . a meaningful administrative enforcement mechanism" structured ". . . to vindicate an affirmative right." In the absence of a meaningful administrative remedy, 10/ the Lloyd court held that "neither the exhaustion nor primary jurisdiction doctrine applies." Id. at 1287.

For two reasons, one structural and one institutional, a meaningful administrative enforcement mechanism does not exist under §504. Under the circumstances, to insist upon exhaustion is merely to require that plaintiffs engage in a futile gesture.

10/ At the time Lloyd was decided, the §504 regulations were not in effect.

i. HEW'S Enforcement Procedures Under §504 Are Not Designed to Remedy Individual Complaints of Discrimination.

The regulations adopted by HEW pursuant to §504, 45 C.F.R. §84.6, incorporate by reference the administrative procedures applicable to Title VI of the Civil Rights Act of 1964, 45 C.F.R. §80.6 - 80.10 and Part 81. Those procedures in turn focus exclusively on the question of whether or not, in light of the policies and practices of a recipient of federal assistance, HEW should cut off federal funds. It is important to emphasize that this administrative mechanism is not designed to remedy deprivations of the personal rights of individual complainants, but rather to determine whether, in light of systematic noncompliance, recipients should continue to receive federal funds.

In the context of Title VI, the distinction between vindication of personal rights and termination of federal funds is reflected in the statute itself, as Justice Stevens observed in his opinion in Bakke v. Regents, supra, 57 L.Ed. 2d at 852, n. 26.

> The government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds . . . Section 601 is specifically addressed to personal rights, while §602 - the fund cut-off provision - established an

> elaborate mechanism for governmental enforcement by federal agencies. Id. at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme. . . . The difference between their two courses of action is clear and significant. As the Government itself states:
>
> "[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602 . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations [including administrative exhaustion] contained in Section 602." Supplemental Brief, supra, at 30 n. 25.
>
> The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See Rosado v. Wyman, 397 U.S. 397, 420.

Quite clearly, the regulations promulgated by HEW to implement §504 do nothing more than "authorize [a] termination of funds." The regulations define an administrative scheme by which the Secretary of HEW can monitor and enforce the nondiscrimination provisions of a contract between HEW and the recipients of federal financial assistance. The regulations are not designed to redress the personal grievances of handicapped individuals who suffer from discrimination in federally funded programs. If anything, the termination of funds will only leave such individuals in far worse straits.

Under the regulations HEW must initiate an administrative investigation whenever a compliance review or other information, including an individual complaint, indicates a possible violation of the statute or regulations. 45 C.F.R. §80.7. No provision, however, is made for an individual complainant to furnish evidence or otherwise participate in the investigation. 45 C.F.R. §80.7 (c). If HEW concludes that there is no violation, it gives notice to both the recipient and the complainant - but the individual complainant has no right to object to or seek review of HEW'S finding. 45 C.F.R. §80.7 (a)(2). Should HEW determine that the recipient is not in compliance, attempts are then made to obtain voluntary compliance in accord with the statutory mandate. But HEW can totally ignore the individual victim of past discrimination in its efforts to secure voluntary compliance for the future.

If voluntary compliance efforts fail, an administrative hearing is held. 45 C.F.R. §80.8 -80.9. The determination as to whether a hearing will occur

and the definition of the issues to be pursued is solely the province of HEW and the reciepient.See 45 C.F.R. §80.9(a). At the hearing both HEW and the recipient have the right to be represented by counsel, 45 C.F.R. §80.9(c), and to present relevant evidence, 45 C.F.R. §80.9(d). No such rights are granted to individual complainants. HEW is not required to conduct the hearing on behalf of the individual and in no sense is the hearing intended to provide a forum to obtain individual relief.11/In particular, the administrative scheme does not provide the array of equitable remedies which are available to private litigants in federal court. Thus HEW is not empowered to issue a binding award of damages, backpay, or reinstatement to a victim of discrimination under §504. Whitaker v. Bd. of Higher Ed., supra.

Moreover, the withdrawal of federal assistance from a noncomplying program may "defeat the purpose of the private litigant by terminating the allocation of funds and the . . . program." Rios v. Read, 75 Civ. 296 (E.D.N.Y. October 13, 1978). In Rios, a case brought under Title VI, the court observed that plaintiffs' interests were in the continuation of federal funding in order to provide an adequate bilingual educational program in compliance with Title VI. The HEW remedy, however,

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11/The regulations provide that in the event of noncompliance H.E.W. may effect compliance by cutting off funds or "by any other means authorized by law." The Court in Whitaker found those "other means" to be "unclear," and stated that a cut-off of funds was the principal sanction and that "the regulations simply provide no procedures by which any other sanctions may be imposed or judicially reviewed." Whitaker, supra, at 108, n.10.

threatened the very existence of those services to which the complainants sought access. Furthermore, the administrative remedy available under Section 504 is essentially prospective. A program that has discriminated in the past may continue to receive federal financial assistance if it desists from doing so in the future and takes steps necessary to come into compliance with the statute. Although future compliance may include rectifying the effects of past discrimination, as a practical matter this process may not afford effective or expeditious relief to individual victims of unlawful discrimination. "In short, while the administrative process may effectively provide, by way of the threat of a funding termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a §504 violation." Whitaker v. Bd. of Higher Ed., 461 F. Supp. at 1081 12/

12/ Even H.E.W. has publicly acknowledged the inadequacy of its enforcement scheme. As amicus curiae in at least two cases before federal district courts, the Department has urged that exhaustion of administrative remedies should not be required as a prerequisite to private litigation under §504. See Brief of the United States in Whitaker v. Bd. of Higher Ed., supra, and in Mielke v. Hannon, 75 Civ. 473 (N.D. Ill.).

ii. H.E.W.'s Backlog in Resolving §504 Complaints Has Rendered the Administrative Process Futile.

Even if the §504 regulations had created an enforcement system theoretically capable of vindicating personal rights, in practice the excessive and undue delays in that system have rendered it inadequate.

According to H.E.W.'s own statistics, the Office for Civil Rights is already so backlogged with §504 complaints that, for all practical purposes, there is no longer an available administrative remedy.

Figures released in the fall of 1978 reveal that, as of June 1, 1978, H.E.W. had received 1264 individual §504 complaints of discrimination nationally since the institution of the regulations on June 3, 1977.13/ Of this total H.E.W. had not even begun to investigate 653 complaints or 51.6% of the total filed. Corrective action, i.e., voluntary compliance, had been effected in only 47 complaints (3.7%) and 83 complaints had been withdrawn.

Further breakdown of these statistics discloses even greater backlogs in

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13/ These statistics were made available to counsel for amici by the Office of Management and Administration of the Office for Civil Rights (OCR) at H.E.W. in August, 1978 and are current through June 1, 1978. Many of them are contained in plaintiff's Motion for Reconsideration and Memoranda and in the transcript of oral argument held August 4, 1978 in Doe v. N.Y.U., 77 Civ. 6258 (S.D.N.Y.).

resolving particular types of complaints. For example, in post-secondary education, the area in which Ms. Davis' claim of discrimination arose, H.E.W. had received 202 complaints as of June 1, 1978. Only ten letters of finding had been issued, and corrective action had been taken in a scant three instances. Fully 134 individual complaints, or 66% of the total filed, remained uninvestigated. Substantial backlogs in individual complaints of discrimination in post-secondary education existed in Region 3 (15 of 20 outstanding complaints uninvestigated); Region 4 (14 of 20 outstanding complaints uninvestigated); Region 5 (13 of 17 outstanding complaints uninvestigated); Region 6 (16 of 19 outstanding complaints uninvestigated); and Region 7 (14 of 15 outstanding complaints uninvestigated).

H.E.W.'s inability to resolve previously filed §504 complaints expeditiously has severely impaired the Department's ability to handle new complaints. Thus, OCR's Annual Operating Plan for 1978 projected that H.E.W. would investigate only 26 out of 756 complaints likely to be filed under §504 during fiscal year 1978.14/ Of 453 backlog complaints, H.E.W

14/ There is some evidence that OCR underestimated the number of new complaints that would be filed during fiscal year 1978. Region 2, which had anticipated a total of 73 new complaints in 1978 reported 160 new filings as of May 8, 1978. There is also evidence that H.E.W.'s performance in 1978 was slightly better than anticipated, although accurate statistics are not yet available to amici.

predicted that only 14 would be investigated. 43 Fed. Reg. 7048, 7054 (Feb. 17, 1978).

Moreover, even after the long, drawn-out investigative process, severe delays are encountered in the succeeding administrative stages as well.15/ Virtually two years after the effective date of the regulations, H.E.W. has never terminated funding in a §504 case and no administrative hearing has ever been held on a §504 complaint.16/

The delays resulting from H.E.W.'s inability promptly to investigate new and backlogged complaints as well as from the absence of any time limits for the administrative enforcement process, have led to a situation in which H.E.W.'s administrative process could not and cannot currently provide a "meaningful enforcement mechanism." Lloyd, supra, 548

15/ It should be noted that H.E.W. has established no time limits within which it must attempt to enforce the Act upon completion of the investigation of a complaint. A federal court has already found it necessary to impose strict time limits for the investigation phase of the administrative enforcement process, upon finding that administrative delays rendered the rights at issue nugatory. Adams v. Califano, No. 3095-70 (D.D.C., unpublished order December, 1977).

16/ Information furnished to counsel for amici by the Office of Compliance and Enforcement of the Office for Civil Rights at H.E.W. on March 26, 1979. Moreover, according to the Office of Management and Administration of OCR, as of August, 1978, there had been no cut-off of funds under Title VI since 1972.

F.2d at 1286 n.29 for the vindication of private rights.17/

Where there are delays of this magnitude, the case law is clear that plaintiffs need not exhaust administrative remedies before proceeding to court.18/

17/ As summarized in the Middleton affidavit, supra:

> "The Office for Civil Rights has a large backlog of complaints and there is presently no guarantee that any newly filed complaint can be investigated and resolved in an expeditious manner. It would be inconsistent with the Department's desire and the public's need for the speedy resolution of complaints to prohibit aggrieved parties who wish to file suit from doing so and then subject them to a lengthy period of time before acting upon their claim."

18/ See Camenish v. University of Texas, No. A-78-CA-061 (W.D. Tex., May 17, 1978) (preliminary relief granted to §504 plaintiff based on excessive delays); Doe v. New York University, 77 Civ. 6285 (S.D.N.Y. Sept. 12, 1978)(§504 plaintiff permitted to proceed with discovery due to administrative delays); Whitaker v. Board of Higher Education, supra; Howard S. v. Friendswood Ind. School Dist., 454 F.Supp. 634 (S.D. Texas 1978)(11 month delay renders exhaustion futile in §504 case); Dermott Special School Dist. v. Gardner, 278 F.Supp. 687 (E. D. Ark. 1978) (Title VI) See also Walker v. Southern Ry. Co., 385 U.S. 294 (1966).

CONCLUSION

For the foregoing reasons, the Court should hold that section 504 of the Rehabilitation Act of 1973 confers a private right of action, and that exhaustion of administrative remedies is not required, or is futile under the circumstances of this case.

Respectfully submitted,

GEORGE KANNAR
CHARLES S. SIMS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

ROBERT M. LEVY
STEVEN R. SHAPIRO
New York Civil Liberties Union Foundation
84 Fifth Avenue
New York, New York 10011

Of counsel:
BRUCE J. ENNIS

FRED OKRAND
SAM ROSENWEIN
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

Attorneys for Amici Curiae

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE AND THE FOUNDATION FOR SCIENCE AND THE HANDICAPPED AS AMICI CURIAE

JOHN D. LANE
MICHAEL D. SAVAGE
1211 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae American Association for the Advancement of Science Foundation for Science and the Handicapped

Of Counsel:

HEDRICK AND LANE
Washington, D.C.

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CONSENT TO FILING

This Amici Brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTERESTS OF THE AMICI CURIAE

The American Association for the Advancement of Science ("AAAS"), a non-profit organization founded in 1848, is a national scientific society embracing all of

the sciences. The objectives of AAAS are "to further the work of scientists, to facilitate cooperation among them, to foster scientific freedom and responsibility, to improve the effectiveness of science in the promotion of human welfare and to increase public understanding and appreciation of the importance and promise of the methods of science in human progress."

AAAS has 130,000 individual members and 280 affiliated organizations as federated members. These groups, ranging in size and interest area from the state and local academies of science to the 110,000-member American Chemical Society, give AAAS a secondary relationship with approximately seven million science professionals and lay supporters.

The Foundation for Science and the Handicapped, ("the Foundation"), founded in 1978, is a non-profit organization of successful handicapped scientists and professionals in various fields who offer their skills to help solve problems related to being handicapped. The Foundation is concerned with developing increased employment opportunities for handicapped scientists as well as providing interested handicapped youth an adequate background for approaching the various scientific disciplines as vocational objectives. Two other objectives of the Foundation are the development of technology designed to improve the quality of life for the handicapped and the dissemination of information regarding the ability of handicapped scientists to compete with their non-disabled peers for every scientific and management position.

All of the members of AAAS and those handicapped professionals in the Foundation for Science and the Handicapped have a unique interest in laws which de-

velop and increase opportunities in the various scientific fields. A ruling by this Court in favor of an admissions policy which can exclude a class of people, in this case the deaf and hearing-impaired, from a course of study would have grave implications for handicapped persons who seek to be evaluated on their individual abilities. Such a ruling could effectively preclude many potentially talented scientists and medical professionals from attaining the education necessary to succeed in their chosen professions.

It has been assumed that a handicapped person cannot safely and effectively perform as a nurse. It is the amici's position that handicapped persons can perform safely and effectively not only as nurses, but in many other science-related fields as well. In support of their position, amici offer herein data on handicapped nurses, doctors and scientists throughout the United States who are making valuable contributions to society and the progress of science in nursing and in other fields.

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

H.E.W. Regulations implementing section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84.3(k)(3),

provide that for purposes of Section 504, "qualified handicapped persons" means

> (3) with respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

STATEMENT OF THE CASE

Frances B. Davis (respondent) is a licensed practical nurse who was academically qualified for admission to the postsecondary Associate Degree Nursing Program of the Southeastern Community College (petitioner). Ms. Davis was denied admission to this Program solely because she has a severe hearing disability.[1] Ms. Davis filed suit against the College, alleging discrimination against her because of her handicap, in violation of Section 504 of the Rehabilitation Act of 1973. The District Court dismissed her suit, holding that Section 504 allowed exclusion of a handicapped person from a federally assisted program solely by reason of the handicap if "the nature of the handicap renders the person unable to fully and effectively participate in the activity." 424 F.Supp. at 1345. The Fourth Circuit reversed, holding that Section 504 required that Ms. Davis be judged for admission solely on the basis of her academic and technical qualifications, and it remanded the case for that purpose.

[1] These facts, upon which there is no apparent disagreement, are developed more fully in the Briefs of Petitioner and Respondent.

SUMMARY OF ARGUMENT

The objective of the Congress in enacting Section 504 of the Rehabilitation Act of 1973 was to prohibit the kind of prejudgment of handicapped people which has occurred in this case, and Section 504 should not be interpreted in a manner which permits such prejudgment.

ARGUMENT

The issue in this case is whether Section 504 of the Act prohibits the exclusion of an academically qualified individual from an education program in nursing solely because she is handicapped by a severe loss of hearing.

The Fourth Circuit Court of Appeals has held that exclusion solely on the basis of the disability is prohibited under Section 504 and that the individual must be judged for admission to the program only on the basis of her academic and technical qualifications. The court of appeals did not rule on whether, based on these qualifications, Ms. Davis should be admitted. That is up to the College. Nor did the court of appeals express an opinion on whether, if admitted, Ms. Davis could complete the program successfully. That is up to Ms. Davis. The court of appeals merely held that Section 504 requires that she be given the same consideration for admission to the program that is accorded to nonhandicapped individuals.

Petitioner argues that exclusion based on disability is permitted under Section 504. Petitioner interprets Section 504 to permit exclusion of an individual if the nature of the individual's handicap renders her unable to fully and effectively participate in the program. Without explicitly stating it, petitioner necessarily interprets Section 504 to permit petitioner to determine

in advance whether the nature of Ms. Davis' handicap precludes her from successful participation in the program.

In enacting Section 504 of the Act, Congress recognized that there are common misconceptions about the ability of handicapped people to perform certain jobs. The term "handicapped person" does not represent any homogeneous group of people with uniform interests, needs or concerns. Each person, regardless of handicap, has individual strengths and weaknesses, needs and goals. Stereotypes and classification of handicapped persons strip away these individual characteristics which make each of us unique, and often prevent handicapped people who could perform certain jobs from even being given the opportunity to prove it. The existence of this state of affairs is not something which is, or needs to be, spelled out in Congressional hearings or Committee Reports. Observant men know that these misconceptions and stereotypes exist. AAAS and the Foundation believe that the case at bar is strong evidence that these misconceptions and stereotypes exist. Congress, in its wisdom, has identified the problem and sought to eliminate it by the enactment of Section 504. It is important that this Congressional objective be recognized here and now.

Petitioner interprets Section 504 to permit it to prejudge the effect of Ms. Davis' handicap on her ability to become a nurse. Armed with this power, petitioner has determined that, due to her handicap, Ms. Davis could never become a registered nurse. The fact is, however, that petitioner does not know whether this individual, Frances B. Davis, can complete the education program and become a registered nurse notwithstanding her hearing disability. Petitioner has never

observed Ms. Davis attempting to complete such a program. Petitioner relies chiefly on a conclusion expressed by the Executive Director of the North Carolina Board of Nursing that Ms. Davis' "hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, or by license as an LPN." However, the Executive Director does not know whether this individual, Frances B. Davis, can become a nurse. The Executive Director apparently has never met Ms. Davis and did not know that Ms. Davis had been licensed as an LPN since 1967. No one has made a determination that *Frances B. Davis* cannot perform as a registered nurse, and no one intends to provide an opportunity under which such a determination might be made. Instead, it has been *assumed* that all people with hearing disabilities similar to Ms. Davis' cannot function as nurses.

It is precisely assumptions such as this one that Congress has attacked in Section 504—assumptions which are wrong. There are today working registered nurses with severe hearing disabilities, and amici wish to advise the Court of their names and professional backgrounds.

In 1975, AAAS initiated a Project on the Handicapped in Science. This project was started under the auspices of AAAS's Office of Opportunities in Science which was established for the purpose of improving the status of women and minorities in science and increasing their number and visibility in the scientific community. The Project on the Handicapped in Science has made AAAS a national center for the concerns of the handicapped in science and for the improvement of scientific education for handicapped young people.

One task which the Project has accomplished is the gathering of information on handicapped people who are presently working in science-related fields. Much of this information has been published in a Resource Directory of Handicapped Scientists [2] which contains the names, addresses and fields of study of over 500 handicapped people. The Resource Directory shows that handicapped people are presently represented in a variety of professions ranging from medicine and law to computer sciences and pure physics. Listed below are the names of a number of nurses with hearing disabilities, with biographical material obtained for publication in present or future Directories:

(1) *Cathy Merriken, R.N.:* Ms. Merriken has had a severe hearing loss since the age of 6, and wears a hearing aid in her better ear. She attended regular public schools with hearing children throughout her education. She decided to attend nursing school and, once accepted, was on the Dean's List every year. Since graduation, Ms. Merriken has been working on the night shift as a registered nurse at Holy Cross Hospital in Silver Spring, Maryland. She works on a post-operative surgical floor, where she and a nurse's aide are in charge of thirty patients. The floor is busy and there is greater responsibility at night because fewer staff members are on duty. Ms. Merriken is taking courses at Montgomery Community College, and has been accepted by the University of Chicago to study for a PhD in Sumerian Linguistics. She has some problems because of her deafness, such as taking blood pressures, but these are resolved with the assistance of a nurse's aide. She has developed her other senses and skills and feels as competent as the other nurses, perhaps more competent.

[2] Owens, J. A., Redden, M. R. and Brown, J. W., 1978 *Resource Directory of Handicapped Scientists*, Library of Congress Catalog Number 78-64869, AAAS Publication Number 78-13. Several copies of this publication have been lodged with the clerk of the Court.

(2) *Erica Herzig, R.N.:* Ms. Herzig has a severe congenital hearing loss which has remained constant for the past twenty years. She attended private schools in New York, and received continuous speech therapy for her hearing disability. After graduation from Beloit College with a BS in Sociology, Ms. Herzig became interested in a nursing career. She was determined to complete the program, and with support from both fellow students and faculty members, she successfully completed her training. She is currently employed as a registered nurse at the Loeb Center for Rehabilitation at the Montefiore Hospital/Medical Center in New York City. She is a primary-care nurse with an average case load of eight patients. Ms. Herzig is in charge of all assessment, all medications, all treatment, all prescriptions, all vital signs for these eight patients, who have a variety of medical problems, e.g., medical, surgical, open-heart surgery, post-operative wound infections, diabetic, stroke, and cancer. She is able to care for all the patients' needs, and rarely calls another staff member for assistance.

(3) *Keith Ellen Ragsdale, R.N.:* Ms. Ragsdale has had a severe hearing loss since she was four years old. She wears hearing aids, and has excellent speech. She attended regular schools and had special training in lipreading and speech therapy. She graduated from Del Mar College in Texas with an AA degree, became a Registered Nurse, and later worked in an intensive care unit and coronary care unit. Ms. Ragsdale also

received a BS in Nursing, an MS in Community Health Nursing and was certified as a Nurse Practitioner in that component. After switching her career emphasis from acute care to community health, Ms. Ragsdale held various teaching positions in community health nursing and held the position of chairperson of the Texas Nurses Association Community Health Nursing Conference Group. She is currently teaching, administering and authoring a textbook on community health care.

(4) *Ann Keenan Ogden, R.N.*,[3] severely deafened as a result of chicken pox at age 3, works as a registered nurse in the advanced care and rehabilitation unit at Memorial Hospital Medical Center in Long Beach, California. She works with patients age 18 to 100 years, who are learning to cope with the effects of total joint implantation, stroke, paraplegia and quadraplegia. As staff nurse, she is responsible for patient care and treatment, which includes communication with patients and their families. She continues to develop her own communication abilities and residual hearing through speech therapy. Ms. Ogden is a graduate of a three-year program at St. Anthony's School of Nursing in Rockford, Illinois. She began speech therapy and lip-reading training at age 4 and spent most of her childhood in regular classrooms.

(5) *Kaye Herth, R.N.:* Born with a mild hearing loss at birth which has become more severe over the years and is now total, Ms. Herth is presently an Assistant Professor of Nursing at the University of Texas College of Nursing. She is a registered nurse, and has also received her MS in Medical Surgical nursing and a certificate in Physical Assessment. She has held positions as a Teamleader in Medical-Surgical, Staff and Charge Nurse on a Pediatrics floor, Fundamental's Instructor, Nursing Coordinator for Medical-Surgical, and Medical Surgical Instructor. Ms. Herth attended special classes for the hearing-impaired in grade school and participated in all lab courses in high school, college and at graduate school. She received some assistance with the lectures during college, but was never exempted from any courses or field trips. When she lectures to large groups of students in an auditorium, another instructor interprets the questions from the students in the back of the room. Ms. Herth has been elected to be listed in "Who's Who in American Women 1977-1978," 1979 "World's Who's Who of Women in Education," was named Outstanding Graduating Senior from Northern Illinois University, and Outstanding Graduate Nurse, Wisconsin 1969.

[3] Ms. Ogden's biographical sketch is taken from *Newsounds*, March/April 1976 (a publication of the Alexander Graham Bell Association for the Deaf, Washington, D.C.).

(6) *Holly Roth:* Ms. Roth, deaf since birth, has been accepted to the nursing school at Howard Community College in Columbia, Maryland and will begin training in September of 1979 to become a registered nurse. Without hearing aids, Ms. Roth is totally deaf and with hearing aids she can hear about 70% of what is said. She was trained to be a nurse's aide at the Katzenbach School for the Deaf in New Jersey, a state school for the deaf which has a good vocational training department. When she starts classes in the fall, Ms. Roth will be assisted by interpreters and will use an electronic stethescope to permit her to take blood pressures.

The above list is not all inclusive. There are, no doubt, many other people with hearing disabilities who are working as registered nurses. Some of them do not wish to be identified, or simply have not yet identified themselves to AAAS (or the Foundation). The search for hearing-impaired nurses has been conducted by word of mouth, and has only recently succeeded in contacting the nurses noted above.

Handicapped persons are represented not only in nursing, but in virtually every field of science, demonstrating that there are open-minded admissions directors who have determined that physical impairments may not necessarily interfere with the safe and conscientious practice of many science-related or medical professions. A few of the handicapped people working in other fields (most of whom are listed in the Resource Directory) are listed below:

(1) *John Gavin, PhD:* Dr. Gavin became totally deaf at the age of 33, and went on to earn a doctorate in biology. He is currently the Director of International Allergy Research for Miles Laboratories, and is involved in writing, research and travel abroad. He was never exempted from any courses or lab work, and the only accommodation he utilizes today is two telephones, so that his secretary can act as his "ears." His resume lists over 40 articles to his credit, and Dr. Gavin is recognized as the original stimulus for the AAAS Project on the Handicapped in Science. He attributes his success to "patience, plus persistence plus excellence in performance," and has noted that "the most difficult professional barrier to overcome is the limitations imposed by non-handicapped individuals who judge what you can do by what they think they could do if they had the same condition."

(2) *Nancy Sharpless, PhD:* Dr. Sharpless is a research biochemist who is currently an Associate Professor of Psychiatry at Einstein Medical College of Yeshiva University in New York City. She lost her hearing at the age of 14, is completely deaf with associated balance difficulties, and her speech, although not "normal," is clear. She earned a BA in Zoology from Oberlin, an MS in Medical Technology and a PhD in Biochemistry/Chemistry from Wayne State. She has never attended any special schools and has completed all the required lab courses in high school, college and graduate school. Two accommodations she made in the course of her study were to have other students take notes for her on field trips, and to have someone else get blood pressure readings when she worked with patients. These modifications were only minor, and she was never exempted from any classes or field trips. In her professional career today, she has her secretary take and make her phone calls, and conducts conferences with her colleagues in person, rather than over the phone. Perseverance is the main quality that she reports as essential to get her through her educational training.

(3) *Donald L. Ballantyne, PhD:* Dr. Ballantyne, deaf since birth, is currently Professor of Experimental Surgery, Chief of Microsurgical Research Laboratories, and Director of the Microsurgery Training Program at the Institute of Reconstructive Plastic Surgery at New York University Medical Center. He has an AB in Chemistry, an MS in Biology and a PhD in Biology, and completed all of the required lab courses for those degrees. He has had training in lipreading, and he uses two telephones, like John Gavin, to receive calls.

(4) *Myron Weinberger, M.D.:* Dr. Weinberger has a severe, apparently congenital, neurosensory hearing loss which was not discovered until his early school years. He taught himself lipreading, is able to communicate verbally, and has worn a hearing aid his entire life. He took no special courses nor had any special program to accomplish his educational goals, although teachers and counsellors all along the way tried to dissuade him from going into medicine because of his deafness. The only major difficulty he experienced during medical school was taking notes quickly enough in the basic science lecture courses. The problem of listening to heart and lung sounds has been resolved by his use of an electronic amplifying stethoscope.

Dr. Weinberger has received training in the areas of Pulmonary Disease, Cardiology and Endocrinology. He has a BA in Zoology and an MD degree from Indiana University, has published over 55 articles and studies, and has prepared almost 70 abstracts and presentations. He is currently a practicing physician and Director of the Specialized Center of Research in Hypertension at the Indiana University School of Medicine. He uses a volume amplifying telephone in his office, and notes a common problem for hearing impaired scientists: the inability to lipread in lectures and scientific meetings when lights are turned off to show slides.

(5) *Frank Hochman, M.D.:* Dr. Hochman graduated from college in 1957, but did not gain admittance to medical school until 1972 because medical schools refused to interview him. He is currently in a residency of family practice medicine in San Jose, California. Dr. Hochman has a severe hearing loss, and uses interpreters in the operating and delivery rooms. The only problem he had in medical school was making rounds in a hospital, where everyone would talk at once, making lipreading difficult. Surgery was not a problem because everything was discussed beforehand and there was very little talking during the actual surgery. Dr. Hochman uses an electronic hearing aid stethoscope, and a beeper which notifies him that he is being paged in the hospital.

(6) *Joseph J. Panzarella, M.D.:* Despite the fact that as a victim of multiple sclerosis he can move only his head and constantly needs an attendant, Dr. Panzarella is presently holding several jobs. In addition to his position as Director of the Brunswick Rehabilitation Center in Amityville, Long Island, he is Director of the Department of Rehabilitation Medicine at Franklin General Hospital in Valley Stream, Long Island; rehabilitation consultant to Continental Insurance Company; and Professor of Physical Therapy (and other subjects) at New York University Post Graduate Medical School, Nassau Community College and Suffolk Community College.

(7) *David Hartman, M.D.,* was the first blind person to have been admitted to an American medical school in almost a century. He graduated in the top 20% of his class at Temple University School of Medicine in 1976, completing all required courses with only minor deviations. He is planning to specialize in psychiatry with a special emphasis on physical and psychological rehabilitation of handicapped people.

David Hartman was born with congenitally deformed lenses and became totally blind at the age of 8. He was admitted to Gettysburg College and successfully com-

pleted all the lab work for a biology degree, substituting touch for sight in many lab experiments. He graduated Phi Beta Kappa in 1972, with a slightly less than A average in his coursework.

Recording for the Blind presented Dr. Hartman with the Founder's award, and RFB's president, John W. Castles, III, praised him "for exhibiting a triumph of the human spirit." The citation concluded "with the example of David Hartman before us, we feel renewed faith in the infinite possibilities of all people."

The people described above are all examples of people with severe hearing or other disabilities who are licensed as registered nurses or other science-related professionals and who are making valuable contributions to their communities and to society as a whole, notwithstanding their handicaps. Amici have provided the Court with these examples to demonstrate one point: the assumption that people with hearing disabilities (or any disability) cannot complete an education program and become registered nurses is an incorrect assumption which cannot be used to deny such people the opportunity to do so. Clearly, Congress knew that assumptions such as this are made and that they are wrong and dangerous. It seeks to eradicate them with Section 504. The Department of Health, Education and Welfare confirms that this was Congress's objective. In Regulation § 84.3(k)(3), defining a qualified handicapped person with respect to post-secondary and vocational education services, there is no language dealing with the effect of the handicap on the ability of such people to succeed in the program. Neither the Congress, HEW, the petitioner nor this Court knows whether a particular handicapped person can do the work notwithstanding her handicap. The purpose of Section 504 is to give her a chance.

CONCLUSION

Petitioner would interpret Section 504 to permit petitioner to do precisely what Congress sought to outlaw—the prejudgment of the capabilities of handicapped individuals. The court of appeals has realized that to interpret Section 504 in any manner which permits such prejudgment would defeat the Congressional purpose entirely and drain the law of all its substance.

This Court should exercise its power to direct Southeastern Community College to consider Ms. Davis for admission to its Associate Degree Nursing Program based solely on her abilities and without regard to her hearing impairment.

Respectfully submitted,

JOHN D. LANE
MICHAEL D. SAVAGE
HEDRICK AND LANE
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 628-5923

Attorneys for *Amici Curiae*
American Association for the Advancement of Science
Foundation for Science and the Handicapped

FOR ARGUMENT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-711

Southeastern Community College,

Petitioner,

v.

Frances B. Davis,

Respondent.

On *writ of Certiorari* to the United States Court of Appeals for the Fourth Circuit

Brief of the Center for Independent Living, and others as *amici curiae* in support of respondents

Of Counsel:

ANN FAGAN GINGER
1715 Francisco St.
Berkeley, CA 94703
(415) 848-0599

ROBERT J. FUNK

SUSAN B. SCHAPIRO

PAUL A. SILVER
Disability Law Resource Center
Center for Independent Living
2539 Telegraph Ave.
Berkeley, CA 94704
(415) 548-4274

Attorneys for Amici Curiae

March 26, 1979

Berkeley, CA • **HELIOGRAPHICS** • (415) 548-8492

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Brief of the Disability Law Resource Center of the Center for Independent Living, Inc.;James Donald, Deputy Director, Legal Affairs Division, on behalf of the California State Department of Rehabilitation; Center for Independent Living, Inc.; Center for Living Independently in Pasadena; Bay Area Center for Law and the Deaf; and Deaf Self-Help, Inc. as amici curiae in support of respondent.

INTEREST OF THE AMICI CURIAE

The following groups, entities and individuals, as AMICI CURIAE, respectively submit this brief to the Court in support of the Respondent. (Copies of letters from the parties consenting to the Amici filing this brief have been filed with the Clerk of the Court).

·Disability Law Resource Center of the Center for Independent Living, Inc. (CIL/DLRC):

CIL/DLRC is a legal support and technical assistance center for the community based independent living/disability rights movement. The staff, including attorneys, paralegals and community organizers, provide legal assistance, back-up, education and training in disability rights and disability awareness. The goal is to ensure disabled people have the equal opportunity to full participation in society.

·James Donald, Deputy Director, Legal Affairs, on behalf of the California State Department of Rehabilitation (DR):

DR is the state agency designated in California to provide vocational and related rehabilitation services. A major objective is to train/retrain disabled people and enable them to move from a government benefit system to a position as a contributing member of society.

·Center for Independent Living, Inc. (CIL):
·Center for Living Independently in Pasadena (CLIP):

CIL and CLIP are non-residential community based independent living projects (ILP's) situated in the State of California. The ILP's are support centers run by and for disabled people. These projects provide, among others, services such as peer counseling, financial counseling, wheelchair repair, mobility training for blind persons and interpreters and services for the deaf, to a broad range of disabled people in their respective communities. The goal of the ILP's and their services is to assist disabled people to live independent lives; that is, lives outside of institutions.

The ILP's operate from a philosphical belief that all people, regardless of their physical or mental attributes, have the

right to participate in society to the full extent of their abilities and desires.

·Bay Area Center on Law and the Deaf (BACLAD):

BACLAD provides legal assistance to deaf people in the San Francisco Bay Area. A major focus is also impact work to ensure equal opportunity to deaf people who wish to participate in society.

·Deaf Self-Help, Inc. (DSH):

DSH is an employment counseling, placement and referral project that provides assistance to deaf persons. Their goal is to assist deaf persons in entering and remaining in the job market and achieving their full potential.

QUESTION PRESENTED

Whether a civil rights statute that prohibits discrimination on the basis of handicap can provide meaningful equal opportunity if the statute is not interpreted to impose an affirmative duty to make accommodations for persons with disabilities.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973 was enacted by Congress to put an end to long-standing discrimination against disabled persons by recipients of federal financial assistance. A long history of discrimination against the disabled has lead to a society that was designed without considering the needs of disabled persons. Disabled persons are segregated away from the mainstream of society by attitudinal, architectural, and communications barriers. Therefore, any statute that purports to ban discrimination against the disabled must be interpreted to require special accommodation to the needs of disabled persons, or the statute will be meaningless.

The HEW regulations implementing Section 504 correctly interpreted the statute as requiring institutions of post-secondary education to make special accommodations to the needs of disabled students.

I. A CIVIL RIGHTS LAW THAT PROHIBITS DISCRIMINATION ON THE BASIS OF HANDICAP MUST IMPOSE AN AFFIRMATIVE OBLIGATION TO TAKE POSITIVE ACTION TO ACCOMMODATE TO THE VERY HANDICAPS THE LAW PROHIBITS DISCRIMINATION AGAINST IF THE LAW IS TO PROVIDE ANY MEANINGFUL EQUALITY OF OPPORTUNITY FOR DISABLED PEOPLE.

A. SECTION 504 OF THE REHABILITATION ACT OF 1973 WAS ENACTED TO END CENTURIES OF DISCRIMINATION AGAINST AND SEGREGATION OF MILLIONS OF DISABLED PERSONS.

1. MISCONCEPTIONS, FEARS AND STEREOTYPES PERPETUATED BY SOCIETY HAVE RESULTED IN CENTURIES OF DISCRIMINATION AGAINST AND SEGREGATION OF DISABLED PEOPLE.

> "Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar 'equality'; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished."[1]

Throughout history, disabled persons have been viewed with a mix of fear and pity. They were feared because of the belief that an ill or "defective" person was a sinner--an evil social deviant marked for punishment.[2] The Bible, for example, listed twelve "blemishes" that prevented a priest from officiating, including "a blind man, or a lame, or a man that is brokenfooted, or be scurvy". The Old Testament commented that "The blind and the lame shall not come into my house."[3]

1. tenBroek and Matson, "The Disabled and the Law of Welfare", 54 Cal. L. R. 809, 814 (1966) (hereinafter cited as tenBroek & Matson).

2. See Wright, "Physical Disability - A Psychological Approach", 259 (Murphy ed. 1960) (hereinafter cited as Wright).

Under Greek law defective children were put to death,[4] and Plato's Commentaries concluded that, in the ideal society,

> "(T)he offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be."[5]

People who are disabled have traditionally been the object of pity--they have been viewed as individuals who are incapable, unwilling and not expected to participate in or contribute to society. Thus, a societal attitude developed that a class of individuals, viewed as defective or different, required special institutions to ensure "proper" care and attention. As late as 1961 this attitude was graphically displayed in a

3. Ibid., 259.

4. A. Deutsch, "The Mentally Ill in America" 334 (1949).

5. Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

quote from a high school civics text:

> "The blind, the deaf, the dumb, the crippled, and the insane and feebleminded are sometimes known collectively as the defective--people who are lacking some normal faculty or power. Such people often need to be placed in some special institution in order to receive proper attention."[6]

These prejudicial attitudes, based on fear and pity, have resulted in the creation of discriminatory laws and practices designed to deny disabled people access to the social mainstream. This discrimination affects all classes of disabled persons[7] in virtually every aspect of their lives. As recently as the 1950's, 28 states had sterilization statutes for disabled people, and 17 specifically included persons with epilepsy.[8] This history includes statutes denying disabled people the right to marry,[9] to vote,[10] to obtain a driver's license,[11] or hold public office.[12] As late as 1974, "ugly" laws prohibited

6. tenBroek and Matson at 811, fn. 8 citing McCrocklin, "Building Citizenship" 244 (1961).

7. It is recognized that society tends to overclassify disabled people - "to emphasize common denominators among disadvantaged groups at the expense of differences between them" (tenBroek and Matson at 812). "Thus, the disabled, like all other minority groups - tend to be evaluated more on the basis of their categorical membership than on their individual characteristics. The disability trait overshadows and qualifies all other traits and abilities...Very seldom will he be evaluated objectively on the basis of his knowledge, abilities, skills, strengths, and weaknesses." (Safilios-Rothschild at 111).

8. Perr, "Epilepsy and the Law", 7 Clev. - Mar. L. R. 280, 290 (1958).

9. Burgdorf and Burgdorf, Jr., "A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause", 15 Santa Clara Lawyer 855, 861 (1975).

10. Ibid., p. 863.

11. Ibid., p. 863.

12. In re Kileen, 121 Misc. 482, 201 N.Y.S. 209 (1923).

appearance in public places by any person who is "diseased, maimed, mutilated, or in any way deformed so as to be an unsightly or disgusting object."[13] Further, in a 1972 rule promulgated by the Air Traffic Conference it was stated:

> "...persons with malodorous conditions, gross disfigurement or other unpleasant characteristics so unusual to offend fellow passengers should not be transported by members."[14]

Under the guise of civilized humanitarian efforts, American society has developed a record, with respect to treatment of disabled persons, that is a history of stigma, isolation and discrimination inflicted upon them because of their handicaps.[15] This history, manifested

13. Comment, "Historical Overview: From Charity to Rights", 50 Temple Law Quarterly 953, 957 (1977).

See, e.g. Chicago, Ill., Mun. Code §36-34 (1966) - Repealed in 1974.

14. Air Traffic Conference of America, Trade Practices Manual, quoted in 118 Cong. Rec. 11363 (1972).

in the attitude of "out of sight - out of mind", carried out through policies of custodialism, has resulted in an ostracized, invisible minority denied access to the social mainstream, a separate class provided with separate facilities and encouraged to interact only with others of the same class.

This segregation is a product of centuries of discrimination against millions of Americans who happen to be disabled. Disabled people, simply because of their disabilities, have been shunned, ignored, stereotyped and placed in institutions and forced to lead confined, restricted lives. They have been denied basic personal liberties: the right to not be unjustly

15. Wright at 14-15. See Hull, "Foreword - The Specter of Equality: Reflections on the Civil Rights of Physically Handicapped Persons" 50 Temple Law Quarterly 944, at 951 (1977).

confined,[16] the right to be abroad in the land and participate in our society.[17]

Through the history of misconceptions, fears and stereotypes, a public policy of segregation has developed. Attitudinal barriers have caused the disabled minority to be excluded from the policy-making process and forgotten. We have, consequently, designed a nation for the average, "normal", able-bodied majority, little realizing that invisible millions cannot enter our buildings, ride our subways and buses, enjoy our educa-

16. tenBroek at 848. See also, O'Connor v. Donaldson, 422 U.S. 563 (1974).

17. See also, Comment, "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled", 61 Georgetown L. J. 1501 (1973).

Achtenberg, "Law and the Physically Disabled: An update with Constitutional Implications", of Southwestern Univerity Law Review 847, 887 (1976).

tenBroek, "The Right to Live in the World: The Disabled and the Law of Torts", 54 Cal. L. R. 841, 848 (1966); (hereinafter cited as tenBroek-Torts).

tional and recreation programs and facilities, and use our communication systems.[18]

It is important to emphasize that physical, communication, and policy and practice barriers are secondary to the underlying attitudinal barriers in creating segregation of disabled individuals.[19] While the treatment of disabled persons as people with full rights in the planning and design of our

18. Bowe, "Handicapping America: Barriers to People", viii (1978) (hereinafter cited as Bowe).

19. It is important to distinguish between the terms disability and handicap. "A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician. A handicap is the cumulative result of the obstacles which the disability interposes between the individual and his functioning in society. A disability is, then, more particularly a medical condition, whereas a handicap more nearly refers to a "cultural definition imposed upon the disabled by their estate." (tenBroek and Matson at 814). Ideally the two concepts should correspond, however, "the psychological and socio-economic handicap suffered by disabled persons far outweighs the actual physical restrictions resulting from the impairment." (tenBroek and Matson at 814). See also, Wright and Safilios-Rothschild.

society may appear as simple as ramping a flight of stairs and providing readers and interpreters, negative attitudes about disability and disabled people make the issue far from simple.

These attitudes result in a profound misunderstanding of the class of people and their interest in the issue at hand. Disabled people want and expect to achieve the right to equal opportunity--the right to equal access to the rewards and responsibilities of our society.[20] That is the real issue. Society must realize the attitudes of fear and pity of disabled people are unfounded and the resulting public policies are unjust.

20. See generally, tenBroek-Torts; Wright; Goffman, "Stigma: Notes on the Management of Spoiled Identity" (1963) and "Deinstitutionalization: Program Policy and Development", Paul, Stedman and Neufeld, editors (1977); Safilios-Rothschild, "The Sociology and Social Psychology of Disability and Rehabilitation, (1970).

2. ENLIGHTENED PUBLIC POLICY, AS DEVELOPED BY THE COURTS AND LEGISLATURES, IS RAPIDLY EVOLVING TO REFLECT AND FOSTER CHANGING SOCIETAL ATTITUDES AND BELIEFS ABOUT THE CAPACITIES, ABILITIES AND RIGHTS OF DISABLED PEOPLE.

In the past few decades, more enlightened attitudes toward the disabled, and the appearance of many groups of disabled persons working toward social change, have brought about changes in public policy. This is evidenced in legislation, in judicial decisions, and in social changes.

As early as 1918 in some states, and 1920 in Congress,[21] Vocational Rehabilitation legislation was passed. This legislation was different from protective legislation

21. See tenBroek-Torts at 843.

in that its purpose was to provide the vocational training disabled persons needed to become self-sufficient. Underlying this legislation was the idea that disabled persons could be self-sufficient and productive members of society. At present, all states have Vocational Rehabilitation statutes.

In addition, nearly all states have enacted architectural barrier statutes which ban architectural barriers on new construction.[22]

Further, most states have enacted statutes prohibiting discrimination against the disabled in employment[23]. Again, some states have limited this to public employment, while others have banned discrimination by both the public and private sectors.[24]

22. Nicolai and Ricii, Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes, 50 Temple Law Quarterly 1067, at 1069.

23. Ibid., at 1080.

Recent judicial decisions have also shown a trend toward a more enlightened attitude toward disabled persons. For example, in Gurmankin v. Costanza,[25] an appellate court held that a school district's policy of refusing to employ disabled persons as teachers was a violation of their due process rights in that it raised an irrebuttable presumption that disabled persons could not teach. Mills v. Board of Education of the District of Columbia[26] cites that all disabled children were entitled to a free, public education, regardless of the nature or severity of their disability.

Further evidence of social change can be seen all around us. Many cities have begun to install curb ramps at street corners, thus making it possible for persons

24. Ibid., at 1081.

25. 556 F. 2d 184 (1977).

26. 348 F. Supp 866 (D.D.C. 1972).

in wheelchairs to move about freely on city streets. Some public television programs are now presented with captions for the hearing-impaired, and next year two major television networks will be offering a special service in which all of their television programs will be captioned.[27]

However, encouraging as these new attitudes are, they are merely drops in the bucket considering the centuries of discrimination that must be counteracted. State laws are woefully under-enforced,[28] and until recently there has been no strong federal legislation protecting the disabled.

27. Article, San Francisco Chronicle, March 24, 1979.

28. Achtenberg, Law and the Physically Disabled: An Update with Constitutional Implications, 8 Southwestern University Law Review 847, at 855 (1976).

3. REFLECTING THE CHANGING PUBLIC POLICY, SECTION 504 OF THE REHABILITATION ACT OF 1973 WAS ENACTED BY CONGRESS AS A CIVIL RIGHTS ACT TO PROHIBIT DISCRIMINATION ON THE BASIS OF HANDICAP BY RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE AND TO ENSURE EQUALITY OF OPPORTUNITY FOR DISABLED PERSONS.

In 1973, Congress enacted Section 504 of the Rehabilitation Act.[29] Section 504 is the first federal civil rights law to protect the rights of the disabled, and its passage of the act confirms the fact that Congress also perceived a need to end widespread discrimination against the disabled.

Speaking in Congress about the need for

29. 29 U.S.C. 794.

federal legislation to protect the rights of the disabled, prior to the passage of 504, Senator Humphrey commented that the purpose of such legislation was to respond to:

> "an awakening public interest in millions of handicapped children, youth, and adults who suffer the profound indignity and despair of isolation, discrimination, and maltreatment. It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced through prohibiting their exclusion from services receiving Federal assistance."[30]

Late that year, Senator Humphrey commented,

> "The time has come to firmly establish the right of these Americans to dignity and self-respect as equal and contributing members of society, and to end the virtual isolation of millions of children and adults from society."[31]

30. Cong. Rec. - Senate. p. 9495, March 22, 1972.

31. Cong. Rec. - Senate. p. 32310, September 26, 1972.

The passage of Section 504 clearly shows that Congress felt a commitment to end discrimination on the basis of handicap and to bring disabled Americans into the mainstream of society.

B. SECTION 504 MUST BE INTERPRETED TO IMPOSE UPON RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE AN AFFIRMATIVE OBLIGATION TO MAKE ACCOMMODATIONS TO A PERSON'S HANDICAP IF THE LAW IS TO ENSURE MEANINGFUL EQUALITY OF OPPORTUNITY FOR DISABLED PEOPLE.

The language of Section 504 is meaningless if it is interpreted to require only passive non-discrimination against the disabled. Despite recent changes in public policy which have encouraged disabled persons to enter into the mainstream of society,

they will continue to be excluded, unless the architectural, communication, and attitudinal barriers which have confronted disabled persons for so long are removed.

The Department of Health, Education and Welfare, in enacting its 504 regulations, correctly perceived the necessity for interpreting the law so that it would do more than just passively bar discrimination -

> "There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction."[32]

In its regulations, HEW implemented the clear mandate of the law--ending discrimination against the disabled--in the only way it is possible to do so--by imposing an affirmative duty[33] to remove the architectural and communication barriers that prevent disabled persons from fully participating in society.

As we have shown, disabled persons have long been a forgotten minority. They were overlooked and ignored when our transportation systems, buildings, and educational and recreation facilities were designed.

32. Introduction to HEW 504 regulations 42 F R 22676, May 4, 1977.

33. "Affirmative duty" should not be confused with "affirmative action". "Affirmative action" has a special meaning in the context of employment which we do not wish to imply here. By "affirmative duty" we mean a positive obligation to make changes, as opposed to a mere passive duty not to purposely exclude.

Even though the failure to plan for the disabled may not have been through a desire to intentionally exclude them, they have been excluded nonetheless. If we are to rectify this exclusion and segregation, we must also rectify the conditions--the architectural and communications barriers--that perpetuate this exclusion. A law that purports to end discrimination against the disabled, but that does nothing to remove the already existing barriers that foster this discrimination is meaningless.[34]

For many disabled persons, equal opportunity will only be affected through unequal

34. In Lloyd v. Regional Transit Authority, 548 F. 2d 1277 (1977) (U.S.C.A., 7th Cir.) a case which held that section does impose an affirmative duty on recipients, the court commented, "Under these (federal) standards there is no equality of treatment merely by providing (the handicapped) with the same facilities (as ambulatory persons) * * *; for (handicapped persons) who (can) not (gain access to such facilities) are effectively foreclosed)." paraphrased from Lau v. Nichols 414 U.S. at 566, 94 S.Ct. at 788.

treatment.[35] A civil rights statute that bars discrimination against disabled persons, but that merely requires they be accorded the same treatment and be allowed to use the same facilities as other persons, leads one to the untenable result reached by the court in Snowden v. Birmingham.[36] In that case, the court held that a transportation system inaccessible to disabled persons was not discriminatory, since any disabled person who could somehow get on board was still permitted to do so.[37]

That case, and any such interpretation of a civil rights law protecting the disabled represents a profound misunderstanding of

35. This is acknowledged in HEW's May 17, 1976 policy statement interpreting Section 504: "Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination." 41 F. R. 20296 (May 17, 1976).

36. 407 F. Supp. 394 (D.C. Alabama 1975).

the issue,[38] and treats disabled persons like second-class citizens who are not entitled to the full range of freedoms enjoyed by other persons.[39]

The court must be aware that in some ways the disabled differ from other minorities in that they have special needs that can never be accommodated through mere facially neutral policies.[40] However, like other minorities, the disabled have a right to be fully integrated into society. The fact that

37. The court commented, "Persons confined to wheelchairs are permitted to ride as passengers on BJCTA vehicles. Although it is necessary for persons handicapped in this manner to arrange for someone to help them board and alight from the bus, these persons are allowed to use the transportation vehicles in question. Thus, it cannot be said that persons who ambulate by wheelchair are excluded from using the defendant's transportation system."

38. See Hull, Kent, "Foreword - The Specter of Equality: Reflections on the Civil Rights of Physically Handicapped Persons". 50 Temple Law Quareterly 944, at 951 (1977).

39. See tenBroek-Torts, sup. a. 54 California Law Review at 851.

this right can only be realized through special accommodations is not a valid or acceptable reason for relegating disabled persons to a life of segregation.[41]

40. The Court has already held that, at times, a minority group must be accorded special treatment in order for its rights to be fully realized. See Lau v. Nichols 414 v.s. 563, 94 S.Ct. 786, 39 L. Ed. 2d 1. There the Court held that a school district was required to give special instruction to Chinese-speaking students if their right to an education was not to be abridged.

41. It must be clarified that this case does not involve issues of "reasonable accommodation" and "undue hardship". (45CFR84.12). This is a case involving denial of access to educational programs, not employment; economic cost is not a factor. "Economic cost has not been a factor in civil rights since the Emancipation Proclamation." - Gary Gill, CIL/DLRC Albuquerque, New Mexico 504 Training, March 16, 1979; DHEW Secretary Joseph Califano, Jr. stated in his background discussion to the HEW regulations stated: "These problems have been compounded by the fact that ending discriminatory practices involve major burdens on some recipients. These burdens and costs, to be sure, provide no basis for exemption from Section 504 or this regulation Congress' mandate to end discrimination is clear." 42 F. R. 22676, May 4, 1977.

Many commentators cite an economic study by Dave M. O'Neill ("DISCRIMINATION AGAINST HANDICAPPED PERSONS: The Costs, Benefits and Economic Impact of Implementing Section 504..." prepared for the Office for Civil Rights (HEW) under orders #SA-4141-76 and #SA-2471-71), that the annual costs will be "about $3.2 billion" (at 65). They do not, however, include the rest of O'Neill's conclusion. It is clear the real cost to society in this study is estimated to be "...a pecuniary cost deficit of only $.3 billion per year to be balanced against psychic benefits." O'Neill concludes "...that in the aggregate the benefits forthcoming (psychic as well as pecuniary) provide a substantial offset to the costs to be incurred (at 3).

II. IN THE INSTANT CASE, SECTION 504 REQUIRES SOUTHEASTERN COMMUNITY COLLEGE, AS A RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE, TO TAKE AFFIRMATIVE STEPS TO ACCOMMODATE TO FRANCES DAVIS' HANDICAP IN PROVIDING HER WITH AN EDUCATION.

A. THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE REGULATIONS IMPLEMENTING SECTION 504 WITH

RESPECT TO POST-SECONDARY AND VOCATIONAL EDUCATION INSTITUTIONS IS CORRECT AND FOLLOWS THE INTENT AND THE SPIRIT OF A CIVIL RIGHTS LAW MEANT TO END DISCRIMINATION ON THE BASIS OF HANDICAP BY MANDATING THAT A RECIPIENT TAKE AFFIRMATIVE STEPS TO ACCOMMODATE TO THE NEEDS OF A QUALIFIED HANDICAPPED PERSON.

The issue of an obligation to take affirmative steps to accommodate to a qualified handicapped persons arises in two general contexts in provision of post-secondary and vocational education services: (1) in recruitment and admission, and (2) in treatment after admissions.[42]

42. Subpart E - Postsecondary Education, 45 CFR 84.41-84.50. Subpart A - General Provisions, Subpart B - Employment Practices, Subpart C - Program Accessiblity , and Subpart G - Procedures, also apply to post-secondary and vocational institutions (42 CFR 84.1 et seq) and each subpart includes affirmative obligations imposed upon recipients.

First, to ensure the opportunity for full participation of qualified[43] handicapped persons, a recipient's recruitment and admissions policies, practices, and procedures must be free of discrimination. Thus, a post-secondary or vocational education institution may not refuse to admit a person solely on the basis of the person's handicap, if the individual meets the academic and technical standards required for admission or participation in the program or activity (i.e. if the person is qualified).[44] The section-by-section analysis of the 504 regulation, by the Department of Health, Education and Welfare (DHEW) explains that:

> "both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all non-academic admissions criteria that are essential to participation in the program in question."[45]

43. "Qualified" and "Otherwise qualified" are construed to be synonymous terms by HEW. 42 F. R. 22686 (May 4, 1977).

44. 45 CFR 84.3 (k) (3).

These provisions prohibit recipients from making admissions decisions that are based on false stereotypes or presumptions about the capability of a disabled person or class of disabled persons. Each person must be evaluated individually and to ensure a qualified handicapped individual is not denied an equal opportunity for admission the DHEW Regulations require, where necessary, that a recipient take positive steps to accommodate by modification of admission requirements to academic programs.[46]

It may not be sufficient merely to modify academic requirements after admission--it may be necessary to make the modifica-

45. 42 F.R. 22687 (May 4, 1977).

46. 45 CFR 84.44(a).

tion in order for the person to be admitted.[47] Thus, while a recipient shall not be required to modify or substitute for essential requirements, a recipient must modify or substitute for those requirements that "discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant..." [48]

Second, upon admission to a post-secondary or vocational education institution, a qualified handicapped student may require modifications, accommodations, adaptation or aids in order to effectively participate in the program. A recipient must modify those non-essential academic requirements that discriminate or have the effect of discriminating. The section-by-section

47. 45 CFR 84.44(a) lists some examples of types of accommodations a recipient may be required to institute for an individual qualified handicapped student.

48. 45 CFR 84.44(a).

analysis by DHEW states, that while a recipient may not be required to waive course or other academic requirements, a recipient

> "must accommodate those requirements to the needs of individual handicapped students."
>
> "...it should be stressed that academic requirements that can be demonstrated by the recipient to be essential...need not be changed." [49]

It is clear that the language of the regulations is affirmative--

> "A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary..." [50]

Therefore, the burden is on the recipient to take action to adapt or accommodate to the special needs of a qualified handicapped person.

49. 42 F. R. 22692 (May 4, 1977).

50. Ibid.

B. THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS ANALYSIS AND APPLICATION OF SECTION 504 AND THE DHEW REGULATIONS IS CORRECT IN THE INSTANT CASE.

The Fourth Circuit Court of Appeals concluded that the District Court

> "erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was 'otherwise qualified' for admittance to the program,..., rather than focusing upon her academic and technical qualifications..."[51]

Thus, the Court held

> "...that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability."[52]

Further, the Court concluded

51. Davis v. Southeastern Community College 574 F. 2d 1158, 1161 (1978).

52. Ibid., at 1160.

> "...precedent likewise supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive."[53]

The Court recognized that a requirement that educational institutions must take positive steps to accommodate to the needs of a qualified handicapped person is not unreasonable, rather it is necessary in light of the long-perpetuated error of constructing and establishing a society and institutions that do not permit access and participation by disabled persons.

The Fourth Circuit Court of Appeals Analysis follows the mandate of America's colleges and universities stated by the American Council on Education in outlining "A Higher Education Agenda for the 96th Congress":

53. Ibid., at 1162.

> "America's colleges and universities serve as a vital instrument of national progress. The expansion of opportunities for all citizens, the future growth and stability of the economy, and the achievement of broad societal goals are significantly dependent on the capacity of the higher education community to meet the educational and training needs of a diverse population, to advance the frontiers of knowledge and research, and to encourage their practical application." [54]

To make this agenda a reality - to overcome the centuries of discrimination and segregation against disabled people - the Court of Appeals analysis and application of Section 504 and DHEW regulations must be upheld.

54. Saunders, Jr., "Governmental Relations: A Higher Education Agenda for the 96th Congress", 60 Educational Record 103 (1979). The American Council on Education is a comprehensive organization representing the entire community of higher education to Congress.

CONCLUSION

In this case, the Court is presented for the first time with a case raising major policy issues involving the civil rights of disabled people. The Amici Curiae respectively submit to the Court that equal opportunity under Section 504 requires, as implemented in the DHEW Regulations, that recipients be placed under a mandate to take positive steps to accommodate and adapt their programs, services and benefits to the needs of qualified handicapped persons.

It cannot be denied that disabled people have been discriminated against and segregated from the social mainstream. No one will argue that perpetuation of such actions by society is unjust; and no one can quarrel with the goal of full access and participation by disabled persons in society.

Section 504 is the major civil rights

legislation enacted to make such equal access and equal opportunity a reality. To ensure the Congressional mandate of non-discrimination against disabled persons is meaningful--to ensure meaningful equal access and equal opportunity--it is imperative that the Court recognize the barriers presented by societal attitudes, as well as, the physical and related barriers.

The Amici Curiae submit that it is not merely economic/physical barriers society must overcome--but attitudinal barriers that devalue the abilities and desires of people with disabilities. We urge the Court to uphold the court of appeals.

Respectfully submitted,

ROBERT J. FUNK

SUSAN B. SCHAPIRO

PAUL A. SILVER

Disability Law Resource Center
Center for Independent Living
2539 Telegraph Avenue
Berkeley, California 94704
(415) 548-4274
Attorneys for Amici Curiae

ANN FAGAN GINGER

1715 Francisco Street
Berkeley, California 94703
(415) 848-0599
Of Counsel

FOR ARGUMENT

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IN THE

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NATIONAL PROTECTION AND ADVOCACY COORDINATING COMMITTEE
DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK OF PENNSYLVANIA

THOMAS K. GILHOOL
FRANK J. LASKI
DEBORAH KAPLAN
JAMES J. RAGGIO
EDWARD A. STUTMAN
MICHAEL CHURCHILL
Public Interest Law Center of Philadelphia
1315 Walnut Street, Suite 1600
Philadelphia, Pennsylvania 19107
Attorneys for *Amici Curiae*

Printed by Winchell Philadelphia

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DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK OF PENNSYLVANIA

INTEREST OF AMICI

This amicus brief is filed pursuant to Rule 42(2) with the consent of both parties.

Amici American Coalition of Citizens with Disabilities, American Council of the Blind, Disabled In Action of New Jersey, Pennsylvania and Baltimore, Epilepsy Foundation of

America, National Association for Retarded Citizens, National Congress of Organizations of the Physically Handicapped, Paralyzed Veterans of America and United Cerebral Palsy Association are all organizations of and for disabled people. The National Council of Senior Citizens includes many disabled persons among its members. These organizations have chapters and affiliates in every state in the United States. Together they represent well over ten million persons with disabilities.

Amicus National Protection and Advocacy Coordinating Committee represents the directors of the state agencies officially designated by the Governor of each state to protect and advocate the rights of disabled persons. *Amicus* Developmental Disabilities Advocacy Network of Pennsylvania is the official protection and advocacy agency in Pennsylvania.

The efficacy, or not, of Title V of the Rehabilitation Act of 1973 will determine in significant part the opportunities of the disabled members of these organizations to participate fully and freely in the life of this society and enjoy their citizenship. For many decades amici organizations and their members have worked to discover and to supply the necessary conditions for a full and free life by disabled people. They have sought to bring all people to recognize the competences of people who are disabled, to replace historical but confining and defeating stereotypes with respect and appreciation, and to render effective the "present determination"[1] of disabled people to take an equal place in society. Each of amici organizations has contributed to the understanding of the Congress and its resolution in Title V of the Rehabilitation Act of 1973—including particularly Section 504—and related statutes enacted between 1968 and 1975 to charter a new status and a new life for disabled people. Each has worked to implement and to enforce Section 504 and to make its promises real, by assisting recipients of federal financial assistance in self-evaluations and in developing transition and remedial plans, as provided in the Section 504 Regulation, 45

1. Statement of the Director of Nursing Services, Southeastern General Hospital. (App. 140a).

C.F.R. Section 86.6(c) and Section 84.22(e), and by invoking administrative and judicial remedies. Seven of these organizations participated as amici in *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977) and in *United Handicapped Federation v. Andre*, 558 F. 2d 413 (8th Cir. 1977); three participated as amici in the Third Circuit's pending consideration of *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977).

Amicus *American Coalition of Citizens with Disabilities* was founded in 1974 to secure and enforce the civil and human rights of all people with physical or mental disabilities and obtain for its members the education and employment opportunities that make those rights real. Forty-two percent of the disabled working age population are employed (as compared to 74 percent of non-disabled). Only 14 percent of the severely disabled are employed.[2] Nine million disabled people are not employed. While many of them are determined to work, they have been denied the opportunity for education and training prerequisite to meaningful vocation and have been refused the accommodation and modification necessary to free their capacity.

Amicus *American Council of the Blind* is a national membership organization committed to securing and enforcing the civil rights of blind and otherwise handicapped person. For the last seven years the American Council for the Blind has actively worked for enforcement of Section 504 so that its members would not be excluded from higher education or limited in their educational and vocational pursuits.

Amici *Disabled In Action of New Jersey, Disabled In Action of Pennsylvania,* and *Disabled In Action of Baltimore,* are associations of physically disabled people and non-disabled people many of whom, despite their determination to advance, have been excluded from the work force or are only marginally

2. Statement of Assistant Secretary of Labor Donald Elisburg to the House Committee on Education and Labor, H. R. Rep. 1149, 95th Cong., 2d Sess. 24, 1978 U.S. Code Cong. & Admin. News 7513.

employed. The associations share among their purposes the elimination of discriminatory practices against disabled persons in education, employment, housing, and transportation and the enforcement of Section 504 to secure those necessities of life.

Amicus *Epilepsy Foundation of America* was founded in 1968 to advance the interests of Americans with epilepsy through research, vocational programs, legal advocacy and public education programs. The Epilepsy Foundation of America has a long standing commitment to secure and enforce the civil rights of persons with epilepsy and to eliminate the stereotypes and prejudices which serve to exclude persons with epilepsy from education and employment.

Amicus *National Association for Retarded Citizens,* organized in 1950, is a national voluntary organization devoted to improving the welfare of all mentally retarded children and adults. Among the Association's purposes is the realization of vocational, educational, social and personal opportunities for retarded citizens, in the most integrated, least separate community setting, and the enforcement of Section 504 and related legislation to those ends.

Amicus *National Congress of Organizations of the Physically Handicapped, Inc.* is a national coalition of the physically handicapped and their organizations, founded in 1958. The National Congress has among its purposes to secure the education and employment opportunities physically handicapped persons have been denied and to enforce Section 504 and related legislation to enable its members to lead full and productive lives.

Amicus *Paralyzed Veterans of America, Inc.* is a non-profit corporation founded in 1946 and chartered by the United States Congress, 85 Stat. 317. Its ten thousand members are veterans of the United States Armed Services in World War II, the Korean War, and Vietnam. Eighty-seven percent of paralyzed veterans in this country are unemployed. The Paralyzed Veterans of America is determined to eliminate the barriers and ex-

clusionary practices which restrict the ability of spinal cord injured persons to participate in occupations, and to engage in other activities available to all Americans.

Amicus *United Cerebral Palsy Associations* (UCPA), founded in 1948, is a nation-wide network of voluntary community agencies serving the lifetime needs of children and adults with cerebral palsy and their families. Among the association's purposes are the prevention of cerebral palsy; the promotion of the educational, social and physical well-being of persons with cerebral palsy and other developmental disabilities; the elimination of barriers and discriminatory practices which exclude persons with cerebral palsy from education and employment. Like other amici organizations UCPA has members who through sheer determination have made the most of limited opportunities and participate fully in the life of the community. However, many more are denied the education and occupations for which they are qualified and some are completely excluded from their community. See *Halderman v. Pennhurst,* 446 F.Supp. 1295 (E.D. Pa. 1977). UCPA seeks to enforce 504 and other related statutes to end this inequality.

Amicus *National Council of Senior Citizens, Inc.* is a non-profit corporation founded in 1961 to advance the health and social welfare of elderly persons. It has a membership of 3,500 clubs representing three and one-half million individuals, the great majority of whom are retired persons. Many members are disabled. Like other amici, the Council also has an interest in the enhancement of the quality and responsiveness of medical services which will ensue from the insightful participation of people with hearing disabilities in the delivery of medical services. Compare *Davis v. Southeastern Community College,* 574 F.2d 1158, 1161 n.6 (4th Cir. 1978).

Amicus *National Protection and Advocacy Coordinating Committee* is a national organization of the directors of the Protection and Advocacy agencies in all of the fifty states, the District of Columbia, Puerto Rico and the territories. The Congress, in the Developmentally Disabled Assistance and Bill of

Rights Act, 42 U.S.C. Section 6001, mandated that each state establish "a system to protect and advocate the rights of persons with developmental disabilities" with "the authority to pursue legal, administrative and other appropriate remedies" on behalf of the developmentally disabled. 42 U.S.C. Section 6012. See, *Naughton v. Bevilacqua,* 458 F.Supp. 610, 616 (D.R.I. 1978), granting intervention to the agency appointed by the Governor of Rhode Island, the Rhode Island Protection and Advocacy System Inc., an agency "whose insight into the problems and statutory protection of the developmentally disabled has already proved valuable. . ."

In each state the Governor has designated a Protection and Advocacy agency. Section 504 has been the central, crucial instrument to the Protection and Advocacy Systems. Were it vitiated the Protection and Advocacy Systems would be substantially diminished in their ability to discharge their assigned task. If its efficacy is sustained then they may be about their business.[3]

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3. That business, its importance and its accomplishment was described by Senator Kennedy (Mass.) during Senate floor debate on the 1978 Amendments to the Rehabilitation Act and Developmental Disabilities Act:

> . . . the establishment of a protection and advocacy system for the developmentally disabled in 1975 marked a major advance in the movement to assure that the human and legal rights of all developmentally disabled persons would be secured.
>
> The P.&A. system was developed after careful and extensive congressional review of outrageous violations of the rights of the developmentally disabled. Names like Forest Haven and Willowbrook still conjure in one's mind the grossest form of human rights violations.
>
> . . . I do not know how many times we have had television documentaries on Willowbrook, and Forest Haven, and other institutions in this Nation, and still nothing gets done.
>
> Everyone in here knows that the only way that change is going to be brought about is the long, difficult, persistent, and dedicated advocacy . . . through administrative hearings . . . in the courts . . . that is the way it is done.
>
> 124 *Cong. Rec.* S15663 (Sept. 21, 1978)

Amicus *Developmental Disabilities Advocacy Network of Pennsylvania* is the Protection and Advocacy agency in the Commonwealth of Pennsylvania established pursuant to 42 U.S.C. Section 6012. Founded and formed independently in April 1977 by the Pennsylvania Chapter, National Society for Autistic Children, Pennsylvania Association for Retarded Citizens, Pennsylvania Association for Children with Learning Disabilities, United Cerebral Palsy Association of Pennsylvania, and Epilepsy Foundation of America, Pennsylvania Chapter, it was designated by the Governor of Pennsylvania as the Protection and Advocacy agency in July 1977. The Developmental Disabilities Advocacy Network has engaged in individual advocacy and legal advocacy to secure for developmentally disabled children and adults the education, training, and community services which they are entitled under state and federal law which in Pennsylvania they are still denied. *Halderman v. Pennhurst,* 446 F.Supp. 1295 (E.D. Pa. 1977). Like all Protection and Advocacy agencies, the enforcement of Section 504 is central to its advocacy work.

STATEMENT OF THE CASE

Frances B. Davis, in her 47th year, is an actively employed, duly qualified, licensed practical nurse. Her LPN license, issued by the State of North Carolina, is currently in good standing. (App. 109a, 116a).

Motivated by a "determination to continue her education" (App. 140a, 144a), Ms. Davis applied to the Southeastern Community College, a public community college serving her home town in North Carolina. The community college admitted Ms. Davis in 1973-74 and enrolled her in "the undergraduate College Parallel program, designed"—Petitioner's Brief admits (p. 9)—as preparatory for entrance into the College's Associate Degree Nursing Program." (Findings 2, 4). Ms. Davis paid her tuition in the College Parallel program and successfully completed the course work. (App.135a).

In March of 1974, in the course of her application for

admission to the Associate Degree Nursing Program, the college made inquiry into Ms. Davis' handicap. Ms. Davis had "a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear." (Finding 7). With a hearing aid, she heard at the "outer limits of normal hearing levels." (App. 124a).[4]

The Executive Director of the North Carolina Board of Nursing responded to an inquiry from the college and, apparently, to an answer suggested by the college as well:

> "We concur with your opinion as stated on the telephone, that Mrs. Davis' hearing disability can preclude her being safe for practice in any setting allowed by a license as a RN, or by license as a LPN." (App. 132a).

Not that it *does*, but that it *can*. Though the record does not show whether the Executive Director knew that Ms. Davis was licensed as an LPN or that she had practiced as an LPN, safely, apparently, the Executive Director explicitly eschewed an opinion on Ms. Davis' licensing as an RN:

> "We cannot at this time, predict eligibility or ineligibility, for the licensing examination should Mrs. Davis enroll in, and be allowed to complete the program some several years hence." (App. 138a).

The community college inquired of the Director of Nursing Services at Southeastern General Hospital whether the community hospital would employ Ms. Davis as a registered nurse. The Director of Nursing Services answered:

> "In areas such as long term care, a doctor's office or even industrial, she could do well. I do not believe that

4. The Duke University Medical Center audiologist was not asked by the college for an opinion on whether or how Ms. Davis could function as a nurse or as a student in the nursing program, or for an opinion as to what adjustments or accommodations, if any were necessary, would enable her to function. (App. 128a).

> I can truthfully state that she would not be able to function in any area of nursing with her present determination to continue her education . . .
>
> "I would employ Mrs. Davis in our Skilled Nursing Facility as an R.N. if I had a vacancy . . . we have the New Methodist Home that will be built in the near future that will have positions that I feel she can handle. Mrs. Davis could also handle the night assignment on our Post Partum Units without difficulty after she is registered." (App. 140a, 144a).

Nonetheless, Southeastern Community College excluded Ms. Davis from the Associate Degree Nursing Program solely "by reason of her hearing disability." (Finding 11). The single individualized consideration of Ms. Davis, her competences and the requirements of the Program and the profession—that of the Director of Nursing Services—was ignored and she was excluded, on the basis of a blanket judgment that a person with hearing loss could not, as such, be a nurse.

The District Court found that judgment unexceptional and, under Section 504, permissible. The record before the Court established that Ms. Davis was academically qualified for admission to the nursing program. (App. 47a, 114a). The record showed that, with the supervision of an instructor, Ms. Davis could achieve all skill levels in the clinical aspects of the nursing program, only the college was not prepared nor was it resolved to provide such supervision. (App. 78a, 79a).

The Court of Appeals reversed. The Court held that Southeastern Community College must consider Ms. Davis' application for the nursing program without regard to her hearing disability and if otherwise she is qualified, it may then consider the effect, if any, of her handicap but in doing so must determine whether a modification or adjustment, if any is necessary, can be made in the program to accommodate her. Having thus defined the structure of inquiry it found required to comport with Section 504, the Court of Appeals remanded. The Court en banc denied the petition for rehearing.

SUMMARY OF ARGUMENT

I. This case implicating one community college and presenting to this Court but one example of the historic sterotype and prejudice disabled people have been subject to over the decades, tests whether disabled people will be admitted to equal citizenship as the Congress has mandated. By enacting Section 504 the Congress has done no more and no less than to include disabled persons as equal citizens. That mandate requires not only that Ms. Davis have the opportunity to be judged upon her qualifications and performance, and not stereotypical notions of disability, but requires also that four million disabled children be admitted to education appropriate to their needs along with their peers; that the nine million unemployed disabled adults have opportunity for the education and training prerequisite to their productive employment; that qualified disabled people be permitted to fairly compete for jobs; that thirteen million disabled persons have full access to public transportation they can use; and that developmentally disabled persons have effective services in the least separate, most integrated community setting.

The exclusion and isolation of disabled people from the life of the nation was fully before the 93rd Congress and that Congress in the exercise of its powers under Section 5 of the Fourteenth Amendment enacted Section 504 of the Rehabilitation Act of 1973—a Civil Rights Act for the disabled—so that disabled people, like Ms. Davis, through their own enforcement efforts would remedy past discrimination and secure equal opportunity.

The legislative notice of the historical prejudice and stereotype, rooted in mistaken and outdated notions of the competence of disabled people and the legislative finding that legal and social judgments based on these notions must be purged, provided the foundation for a series of federal enactments which form the new congressional charter for disabled people. With Section 504 as the keystone, Congress mandated that educational opportunities be opened up to disabled children, 20 U.S.C. Section 1401 *et seq.;* required federal contractors take affirma-

tive action to hire disabled people, 29 U.S.C. Section 793; provided that severely disabled people receive priority attention in rehabilitation programs; 29 U.S.C. Section 701 *et seq.;* that developmentally disabled people receive adequate habilitation services in the community and that they be protected in the exercise of their rights, 42 U.S.C. Section 6001 *et seq.* At the same time the Congress acted to eliminate physical and architectural barriers, 29 U.S.C. Section 792, and make public transportation fully accessible to disabled persons, 49 U.S.C. Section 1612(a).

These enactments and the legislative record on which they were based informed the meaning and purpose of Section 504 as interpreted by the Court below.

II. The Circuit Court below correctly interpreted Section 504 and correctly structured the inquiry necessary for the district court to enforce Section 504 and the underlying principle of equal protection embodied in the statute. The Circuit Court held that two inquiries in proper sequence are necessary to the common sense and legislatively intended application of Section 504 to this case. Consistent with Section 504 and the HEW Regulation, 45 C.F.R. Part 84, the threshold inquiry into Ms. Davis' qualification for admission to the nursing program must be whether she "meets the academic and technical standards requisite to admission or participation" Section 84.3(k)(3), without reference to her disability. Then if otherwise qualified, without regard to handicap, a second inquiry takes place concerning the necessity of modification of academic requirements which may be discriminatory and not essential to the program of nursing instruction.

This simple two tier inquiry, first focussing on the individual's qualification without regard to disability and secondly on the modification of general requirements, which upon individualized determination may be found to be discriminatory, is the process required to avoid the class judgments, which foster and preserve the stereotypes repugnant to the policy of all civil rights legislation. *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702 (1978); *Griggs v. Duke Power Co.,*

401 U.S. 424, 431, 436 (1971); *Lau v. Nichols,* 414 U.S. 563, 566 (1974).

On the record of this case the college disqualified Ms. Davis solely because of her hearing disability, without regard for her technical and academic qualifications and without taking into account the facts to make a proper determination whether modifications were required or not. On the facts presented here, it is not clear that if the process directed by the Circuit Court were adhered to whether any modification of the nursing program would follow. If such modification is necessary, Section 504 and the Regulation require that the college modify its program to accommodate Ms. Davis and extend equal opportunity to her.

III. The HEW Regulation requiring that programs and services be different in form if necessary to be effective for disabled people and that programs be modified if possible to accommodate disabled people is true to the Congressional purpose and intent of Section 504 and consistent with this Court's teachings that identical treatment of all people without regard to real differences, such as disability, does not extend meaningful equality to them. *Lau v. Nichols,* 414 U.S. 563, 566 (1974); *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971).

The Section 504 requirement of different or modified programs, as *Lau* and *Griggs* suggest, is not properly characterized as special or preferential treatment. Variability—taking into account difference—to achieve functional equality is a common characteristic of most programs and services including education. Higher education, like elementary and secondary education, is individualized and individualizing to a significant degree. Where historic stereotypes and prejudices create a barrier to individualized treatment of members of a class thus foreclosing functional equality to a class of people, it is inherent in the enforcement of the Congressional non-discrimination mandate to remove that barrier. Such enforcement to be real requires in certain cases modification and accommodation so that the nursing education or other program offered be "one all seekers can use." *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971).

To allow less would be to relegate Ms. Davis and the disabled population of this country to the pre-*Lau* status of the Chinese children in the San Francisco schools, or to the superficial equality mutually proferred by the fabled stork and the fox. *Id.*

To characterize the modifications required by Section 504 as "affirmative action" is misleading on the facts of this case and not helpful to the analysis of the correct interpretation and enforcement of Section 504. As in other civil rights matters, the non-discrimination required by Section 504 is seldom achieved by inertia and inaction. Thus, the Courts of Appeals which have given plenary consideration to Section 504 have characterized it and its regulations as creating "an affirmative duty on federal recipients." See, *Lloyd v. Regional Transit Authority,* 548 F.2d 1277, 1283 (7th Cir. 1977); *United Handicapped Federation v. Andre,* 558 F.2d 413, 415 (8th Cir. 1977). The Fourth Circuit's suggestion that the district court "give close attention, on remand, to the regulations [addressing affirmative steps on modification and auxiliary aids]", 574 F.2d at 1162, is in accord with the Seventh and Eighth Circuit opinions, with the teachings of *Lau* and *Griggs* and the common sense understanding of the higher education establishment who write for the guidance of college and university administrators. They say,

> ". . . in practice Section 504 requires something between what is ordinarily defined as 'affirmative action' and 'non-discrimination' since in the process of ensuring non-discrimination, it requires certain actions beyond mere neutrality. . . ." Biehl, R., *Guide to Section 504 Self-Evaluation for Colleges and Universities,* Wash., D.C. National Association of College and University Business Officers (1978), p.7.

IV. In enacting Section 504, Congress intended that it be effectively enforced and that the equal protection norms it codified be enforced. To that end, the Congress conferred a private right of action on disabled people and required that a judicial remedy be available to them. The intention to create a private right of action is explicit. The Senate Labor and Public Welfare Com-

mittee in 1974 declared Section 504 "would permit a judicial remedy through private action". S. Rep. 93-1297 at 40141; 1974 U.S. Code Cong. & Admin. News, 6390-91. That Section 504 gives rise to a private cause of action was recognized by this Court in *Campbell v. Kruse,* 434 U.S. 808 (1977). The intent that judicial remedies be available was confirmed and strengthened by the 1978 Amendments to Title V allowing attorney's fees awards for securing judicial remedies under Section 504. In the unambiguous words of the Conference Committee reporting the 1978 Amendments:

> "The amendment adopted by the Committee would help assure that handicapped individuals will have access to the judicial process in order to assert their rights under title V." Cong. Rec. S19000 (October 14, 1978).

ARGUMENT

I. Section 504 Was Enacted By Congress to Implement the Fourteenth Amendment and to Include Disabled People as Equal Citizens of the United States

Section 504 was enacted by the Congress in the exercise of its powers under Section 5 of the Fourteenth Amendment to enforce the Equal Protection of the Laws. Compare *Katzenbach v. Morgan,* 384 U.S. 641, 648, 650 (1966); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976); Cohen, "Congressional Power to Interpret Due Process and Equal Protection," 27 *Stan. L. Rev.* 603 (1975).

The Congress considered Section 504 and advanced it to enactment over a period of two years. Introduced originally by Senators Humphrey and Percy and Congressman Vanik as an amendment to the Civil Rights Acts of 1964, 118 *Cong. Rec.* S525 (January 20, 1972); 117 *Cong. Rec.* H45974 (December 9, 1971), Section 504 came to be co-sponsored by sixty members of the House and twenty Senators, 118 *Cong. Rec.* S9495 (March 22, 1972), and was ultimately incorporated into the first major revision of the Rehabilitation Act since its enactment in 1920.[5] 118 *Cong. Rec.* S32310 (September 26, 1972), 119 *Cong. Rec.* H1531 (March 8, 1973). With the rest of Title V and the entire Rehabilitation Act of 1973, Section 504 was adopted unanimously by the Congress after two presidential

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5. The federal vocational rehabilitation program is the nation's oldest human service program and one of the oldest federal-state grant-in-aid programs. Congressional interest in "soldier rehabilitation" after World War I and rehabilitation of the industrially disabled led to passage of the Smith-Fess Act (P. L. 66-236) in 1920. In the 58 years since the start of the program the basic concept—full participation of disabled people in the life of the nation—has remained intact. The growth in the program over the years has been continuous with enlargements in scope and effectiveness in legislative authority in 1943, 1954, 1965, 1968, 1973 and 1978. S. Rep. 1135, 92d Cong., 2d Sess. 9 (1972); S. Rep. 1297, 93d Cong., 2d Sess. 25 (1974); H. Rep. 1149, 95th Cong., 2d Sess. 2 (1978). See also, Levitan, S. and Taggart, R., *Jobs for the Disabled,* Johns Hopkins Univ. Press, Baltimore 1977, 27-48. Coverage has expanded from industrially injured physically handi-

vetoes concerning executive and Congressional differences unrelated to Title V. 1973 *Congressional Quarterly Almanac* 557 et seq.[6]

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capped persons to physically disabled, mentally disabled and developmentally disabled persons. Services have expanded from simple vocational training and job placement to a virtually unlimited range of services (including college education) designed to enable the handicapped individual to work, be productive in a sheltered and structured setting or live independently. The accomplishments of the program match its growth. In 1977 a total of 291,202 handicapped persons were rehabilitated. Of this number 127,522 or 44 percent were severely disabled, a group receiving priority under the Act. H. Rep. 1149, 95th Cong., 2d Sess. 2 (1978). With the Comprehensive Rehabilitation Amendments of 1978 the expansion of the program will continue. The Congressional Budget Office estimates the authorization levels and net cost of the rehabilitation program to be over $5 billion for 1979-1983. H. Rep. 1149, 95th Cong., 2d Sess. 30 (1978). The increased priority for service funds for the handicapped and the enforcement of Section 504 is not mere coincidence. As the House Committee on Education and Labor noted in reporting the 1978 Amendment:

> "the expectations of handicapped persons for employment and *equal opportunity* are running high. This is partially in response to Federal initiatives on Section 504 and the recent White House Conference on Handicapped Individuals. If those expectations are to be realized higher authorizations will be necessary. . . ." H. Rep. 1149, 95th Cong., 2d Sess. 11 (1978) (emphasis supplied).

6. The Rehabilitation Act Amendments of 1974 which amended the definition of "handicapped individual" for purposes of Section 504 and the other provisions of Title V were also vetoed and the Congress overrode the veto with near unanimity, 398 to 7 in the House, 90 to 1 in the Senate. S. Rep. 1297, 93d Cong., 2d Sess. 1 (1974).

The Comprehensive Rehabilitation Amendments of 1978, P. L. 95-602 amend Title V to permit courts to award attorney's fees in judicial actions to enforce Title V, make available the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 and authorize the Secretary of Health, Education and Welfare to provide assistance in removal of communication, architectural and transportation barriers (Sec. 120). The Congress again acted with near unanimity, 365 to 2 in the House, 124 *Cong. Rec.* H13476 (Oct. 14, 1978), and 81 to 1 in the Senate, 124 *Cong. Rec.* S15673 (Sept. 21, 1978).

Tracking virtually verbatim the plenary provision of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, the Congress articulated three related prohibitions as the positive law of the land:

> "No otherwise qualified handicapped individual in the United States, as defined in §706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Several states' Attorneys General purport to find "no particular legislative history" to Section 504. But as Mr. Justice Holmes adjured, where Congress "has intimated its will however indirectly that will should be recognized and obeyed. . . . [I]t is not adequate discharge of duty for the courts to say: We see what you are driving at but you have not said it, and therefore we shall go on as before." *Johnson v. United States,* 164 F. 30, 32 (1st Cir. 1908); where the purpose of Congress is clear "that purpose must be upheld." *Hudson Distributors, Inc. v. Eli Lilly and Co.,* 377 U.S. 386, 395 (1964). In Section 504 the Congress did more than hint; as the legislative history of Section 504 itself and the history of closely related enactments show, the Congress acted with a particular clarity.

Each prime sponsor of Section 504 announced the intention to extend equal protection of the laws to handicapped Americans. E.g., Senator Humphrey:

> "I introduce . . . a bill . . . to insure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving federal financial assistance." 118 *Cong. Rec.* S525 (January 20, 1972).

and

> "It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced." 118 *Cong. Rec.* S9495 (March 22, 1972).

Congressman Vanik:

> "In an effort to provide increased assistance and equal opportunity for the handicapped of our Nation I am today introducing legislation to provide equal treatment of the handicapped in all programs which receive Federal assistance." 117 *Cong. Rec.* H45974 (December 9, 1971).

Relevant committee reports are to the same effect and are entitled to be carefully considered by the courts. *Red Lion Broadcasting Co., Inc. v. FCC,* 395 U.S. 367, 380-81 (1969).

> "Section 504 was enacted to prevent discrimination against all handicapped individuals . . . in relation to federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided program.
>
> "The section . . . constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." S. Rep. 93-1297, pp. 38, 39-40; 1974 U.S. Code Cong. & Admin. News 6389, 6390-91.

"These *are* people" Senator Humphrey said "who *can* and must be helped to help themselves. That this is their constitutional right is clearly affirmed in a number of recent decisions in various judicial jurisdictions." 118 *Cong. Rec.* S525 (January 20, 1972) (emphasis supplied).

The plenary purpose of the Congress was to open American life to disabled people, to include them in the workings of the society. The evil the statute was intended to remedy, *Rector of Holy Trinity Church v. United States,* 143 U.S. 457, 463, 465 (1892), was "the profound indignity and despair of isolation, discrimination and maltreatment." 118 *Cong. Rec.* S9495 (March 22, 1972).

> "Today the handicapped are generally a hidden population. . . . The handicapped live and struggle among us, often shunted aside, hidden and ignored." 117 *Cong. Rec.* H45974 (December 9, 1971).
>
> "[T]he fundamental fact that one confronts is . . . the segregation of millions of Americans from society—suggesting a disturbing viewpoint that these people are not only forgotten but perhaps expendable. . . . 118 *Cong. Rec.* S9495 (March 22, 1972).
>
> "The opportunities provided by the government almost always exclude the handicapped. . . . 117 *Cong. Rec.* H45975 (December 9, 1971).

The Congress understood full well that the roots of this isolation lay in historical prejudice and stereotype, in mistaken and outdated notions of the competence of severely disabled people; the Congress understood that its rectification required both the elimination of the patterns and institutions of segregation and the individualized address of disabled people and the accommodation of their talents. In Judge Skelly Wright's gentle phrase, Section 504, like the Equal Protection Clause, wherever it reaches,[7] is intended to eliminate "the arbitrary quality of thoughtlessness." *Hobson v. Hansen,* 269 F.Supp. 401, 497 (D.D.C. 1967), aff'd sub nom. *Smuck v. Hobson,* 408 F.2d 175 (D.C.Cir.1969). As Senator Humphrey said:

> "This bill correctly emphasizes the need to serve more severely handicapped individuals, to make services responsive to individual needs, and to make every effort to enable handicapped persons to lead a productive and financially independent life. 118 *Cong. Rec.* S32310 (September 26, 1972).
>
> "These people have the right to live, to work to the best of their ability—to know the dignity to which every human being is entitled." 118 *Cong. Rec.* S525 (January 20, 1972).

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7. There is no dispute in this case but that Southeastern Community College receives federal financial assistance and is bound by the strictures of Section 504.

The Congressional intention to extend equal protection of the laws to handicapped Americans, so manifest in the legislative history of the rehabilitation enactments over the last seven years, was inserted into the Declaration of Purpose of the Rehabilitation Act by the 1978 Amendments to the Act.[8]

The same Congress which considered, enacted and amended Section 504 enacted a series of related statutes premised upon the same Congressional judgments about the competences of disabled people and the necessity of individualized consideration of them. Throughout these enactments the Congress acted to purge historic stereotypes of disabled people, to bar the prejudice which arises from them, to mandate that historic patterns of segregation and exclusion be reversed, that services be extended to disabled people and that they be included in the national life.

In the Rehabilitation Act of 1973, the Congress extended greatly the reach of vocational rehabilitation services, requiring that priority in vocational rehabilitation be given to "those with the most severe handicaps." The legislative fact behind that enactment was not only that severely disabled people can learn but with "multiple services over an extended period of time" 29 U.S.C. Section 706(12), they can learn productive skills and engage in gainful employment. The same Congress, in Section 503 of the Rehabilitation Act of 1973, required government contractors to take affirmative action to employ disabled people including severely disabled people, 29 U.S.C. Section 793. The 1973 Act embodies the Congressional objective that vocational rehabilitation services (including higher education[9]) be

8. P. L. 95-602, 92 Stat. 2955, Sec. 122(a) amends the Declaration of Purpose, 29 U.S.C. Section 702 to read:

> "The purpose of this Act is to develop and implement, through research, training, services, and the *guarantee of equal opportunity*, comprehensive and coordinated programs of vocational rehabilitation and independent living." 92 Stat. 2984. (emphasis supplied)

9. Education in colleges and universities is a vocational rehabilitation service. 29 U.S.C. Section 723(a)(3). In fiscal year 1975, 35% of the persons rehabilitated received assistance at colleges and universities.

individualized. Each disabled person receiving services is entitled to have an "individualized written rehabilitation program" and to actively participate in its development. 29 U.S.C. Section 722; see, *Scott v. Parham*, 422 F.Supp. 111 (N.D. Ga. 1976).

The Education Acts of 1974 and 1975, 20 U.S.C. Section 1401 *et seq.*, are premised in the same Congressional findings about the need for individualized attention and about the competence of severely disabled people. Both Education Acts adopt the principles of normalization, recognize individualization as a necessary condition of learning, e.g., 20 U.S.C. Section 1412(4), place a priority on services to children with the most severe handicaps, e.g., 20 U.S.C. Section 1412(3); and both state their own integration requirement, based upon the same findings and with similar purposes as Section 504's integration imperative: that, "to the maximum extent appropriate, handicapped children, including children who are in public or private institutions or other care facilities, [shall be] educated with children who are not handicapped, . . ." 20 U.S.C. Section 1412(5).[10]

Gollay, E., Bennett, A., *The College Guide for Students with Disabilities* (Cambridge, Mass. Abt Publication 1976, p. 45). The importance of higher education in the rehabilitation scheme is well known. Careful studies of occupational adjustment of disabled Vietnam veterans indicate that education rather than disability status had most effect on employment success. Wilson T., et al. *Disabled Veterans of the Vietnam Era: Employment Problems and Programs* (Alexandria Va. Human Resources Research Organization 1974) pp. 66-70. This confirms the World War II experience where disability reduced the earnings of the college educated veterans by only 5 percent compared with 30 percent for high school graduates. Eggertsson, T., *Economic Aspects of Higher Education Taken Under the World War II G.I. Bill of Rights* (Columbus, Ohio State U. 1972), tables 17 and 20. These studies are reviewed by Levitan and Taggart, who conclude, "There is no doubt that if these relationships hold true in the future, placing a priority on higher education [for disabled people] is sound policy. Levitan S. and Taggart, R., *Jobs for the Disabled* (Baltimore, Md., Johns Hopkins U. Press 1977) pp. 55-58.

10. The Congressional purpose to pierce the stereotype that severely disabled children and young adults cannot be integrated into normalized settings is evident throughout the legislative history. *See* 121 *Cong. Rec.* S10969 (remarks of Sen. Randolph); *id.* at S10961

Congress contemporaneously enacted the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, 42 U.S.C. Section 6001 *et seq.* containing a bill of rights for persons with developmental disabilities, including minimum standards for services and habilitation binding on both the federal government and the states, 42 U.S.C. Section 6010, requiring individualized service plans for developmentally disabled persons, 42 U.S.C. Section 6011; and establishing the protection and advocacy agencies, among the *amici* before this Court. The legislative history of the Developmental Disabilities Assistance and Bill of Rights Act clearly indicated that the rights enumerated including the right to services "designed to maximize the developmental potential of the person", 42 U.S.C. Section 6010(2) "should be protected and assured by the Congress and the courts." H.R. Conf. Rep. No. 94-473, 94th Cong., 1st Sess. 42; (1975); U.S. Code Cong. & Admin. News 919, 961.

The Congressional resolve to end exclusion of disabled people from the life of the community and the education and jobs necessary to participate fully in the community is most evident in the enactments mandating equal access to public places and public transportation. Starting with the Architectural Barriers Act of 1968, 82 Stat. 718, 42 U.S.C. Section 4151, and later establishing the Architectural and Transportation Barriers Compliance Board, in Title V of the Rehabilitation Act of 1973, the Congress has made it clear that there will be no federal participation in facilities that are constructed to exclude disabled persons and those that do must be modified to accommodate disabled people.[11]

(remarks of Sen. Stafford); *id.* at S10981 (remarks of Sens. Cranston and Mondale); *id.* at S10977 (remarks of Sen. Dole); *id.* at H11350 (remarks of Rep. Michel); *id.* at H11351 (remarks of Rep. Daniels).

11. The Executive branch has adopted the Congressional mandate as its own. President Carter in his supplemental message on the State of the Union to the Congress, January 25, 1979, states:

> "For Americans with physical disabilities, this year will result in continued improvements in their accessibility to many opportunities those of us who are not disabled take for granted—education opportunities, employment opportunities, and greater access to public facilities and services. We will make further progress in removing obstacles that impede and discriminate against our disabled community. If our Nation is to remove the barriers of discrimination in our society, the Federal Government must serve as a model in the successful removal of physical and psychological barriers thrown in the way of our Nation's disabled. The Section 504 Regulations issued by the Department of Health, Education and Welfare provide a basis for the Federal Government to lead the way in insuring the rights of the handicapped." 125 *Cong. Rec.* H295 (H. Doc. 96-44) 1979 U. S. Code Cong. and Admin. News 36-37.

In 1970 and four times since (once in Section 504), the Congress has declared "the national policy that elderly and handicapped persons have the same rights as other persons to utilize mass transportation facilities and services" and "that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured . . . ." 49 U.S.C. Section 1612(a).[12]

These enactments and the legislative record on which they were based, see e.g. H. R. Rep. No. 93-244, S. Rep. No. 93-318, H. R. Conf. Rep. No. 93-500, S. Conf. Rep. No. 93-391, 1973 U.S. Code Cong. & Admin. News 2076 et seq. (Rehabilitation Act of 1973), H. R. Rep. No. 93-805, S. Conf. Rep. No. 93-1026, 1974 U.S. Code Cong. & Admin. News 4093 et seq. (Education Amendments of 1974), S. Rep. No. 94-168, S. Conf. Rep. No. 94-455, 1975 U.S. Code Cong. & Admin. News 1425 et seq. (Education for All Handicapped Children Act of 1975), informed the purpose and the meaning of Section 504. Together these enactments, Section 504 being their keystone, bespeak a common purpose and a new Congressional charter for disab'ed people. As the Congress put it in the White House Conference on Handicapped Individuals Act, Section 301(6), 29 U.S.C. Section 701n, enacted December 7, 1974:

12. To the same effect see 23 U.S.C. Section 142 note; Department of Transportation Appropriations Act of 1975, 88 Stat. 781; Federal Aid Highway Act of 1973 Section 165(b), 87 Stat. 282; Federal Aid Highway Act Amendments of 1974, 88 Stat. 2282.

> "The Congress finds that . . . it is essential . . . to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working and service patterns be held as the final objective."

To advance and to secure this objective the Congress enacted Section 504. To this very purpose the Court of Appeals below properly applied it.

In enacting Section 504 the Congress has done no more and no less than to include disabled people as equal citizens. As Professor Karst has written:

> "The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who 'belongs.' Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a non-participant."

K. Karst, The Supreme Court, 1976 Term—Foreword: "Equal Citizenship Under the Fourteenth Amendment," 91 *Harv. L. Rev.* 1, 6 (1977). This principle informed the judgment and order of the Court of Appeals below, as it activates Section 504 itself, and requires that they be affirmed here.

II. The Court of Appeals Correctly Structured and Defined the Inquiry Necessary to Comport With Section 504

In directing the District Court to inquire, first, whether Frances B. Davis was qualified for admission to the nursing program without regard to her hearing disability and, second, if otherwise she is qualified then to inquire whether modification or adjustment, if any is necessary to accommodate her, can be made in the program without altering its essentials, the Court of Appeals was faithful to Section 504, to the HEW Regulation, 45 C.F.R. Part 84 et seq. which authoritatively construes and

and implements Section 504[13] and to the underlying principle of equal citizenship which motivate them.

Both the structure and the substance of the inquiry the Fourth Circuit held necessary are familiar and have been commonly applied by this Court in implementing statutory commands to extend equal citizenship. Section 504, like many positive law civil rights enactments, requires in the aspect of implementation here most relevant, individualizing inquiry. For this Court Mr. Justice Stevens in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) wrote:

> "The question . . . is whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer which the language and purpose of the statute command. . . . The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a . . . class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. . . . Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices which classify employees . . . tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Id.* at 708-09.

What is required is to "measure the person for the job and not the person in the abstract." *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (Title VII). See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971) (Title VII); *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (Title VI).

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13. Executive Order 11914, 41 Fed. Reg. 17871 (April 28, 1976), confided to the Department of Health, Education and Welfare the authority and the duty to establish guidelines for interpreting Section 504 for all federal departments.

The HEW Regulation under 504 chooses, as it must, precisely a structure of inquiry calculated to evoke individualized determinations and to contain and forestall the dominance of stereotype. The Regulation Section 84.42(b)(4) provides:

> "[a recipient of federal financial assistance] may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation."

The first inquiry thus is whether a person "meets the academic and technical standards requisite to admission or participation," Section 84.3(k)(3). This inquiry is to be conducted without reference to the person's disability.[14] If otherwise qualified, by the common academic and technical standards without regard to handicap, then the second inquiry is in point, namely whether

> "Modifications to its academic requirements . . . are necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program instruction being pursued by such student or to any directly related licensing requirements will not be regarded as discriminatory. . . . Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted." Section 84.44(a).

Surely the Regulation may make the choice it does in structuring the inquiry and withholding consideration of the handicap until the second, modification stage, because doing so is reasonably calculated to avoid the contamination of the initial evaluation of competences and qualifications by stereotype. Purging decisions of such contamination was exactly a purpose of the Congress. Similarly the familiar assignment to the recipient (compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), for example) of the burden of demonstrating that a particular modification is inappropriate because the requirement modified is essential is justified as an effective prophylactic against the contamination of stereotype.

On the record of this case the College failed both requirements. The initial judgment of whether Ms. Davis met academic and technical standards of the program was contaminated by consideration of the handicap; indeed the inquiry was dominated by the proscribed pre-admission inquiry into the handicap.[15] The second inquiry was never really joined, because per se, Ms. Davis was disqualified because of her hearing disability. A fortiori, far from discharging its burden to demonstrate the essentiality of perfect hearing to nursing itself or to learning to nurse, the College's own evidence (e.g., the statements of the Director of Nursing Services of Southeastern General Hospital) showed that Ms. Davis could perform the functions of a nurse and its own testimony showed an effective possible modification to course work (attentive clinical supervision) that did not

14. Petitioner and its *amici* constantly invoke the alarm of the "blind bus driver." On no analysis, does the analogous structure of employment inquiries under 504 justify that alarm. Even with pre-employment inquiry into handicap barred and without necessarily getting to the second stage of inquiry, the asserted "blind bus driver" problem is still resolved at the first stage of inquiry, not because of the person's handicap, but simply because he does not drive. The comparison to Frances Davis, who already performs many nursing duties as an LPN, is so strained as to raise an inference that it is exactly with the stereotypes and not with individualized cases that Petitioner is concerned.

15. Consistent with its general scheme and with the purposes of Section 504, the Regulation, Section 84.42(c), allows pre-admission inquiry into handicap only where a recipient has undertaken to take remedial action under Section 84.6(a) or (b). See Analysis of the Regulation, comments 18 and 29. Here, of course, there was no such undertaking by the College, nor does (or could) the record reflect whether the College had conducted the self-evaluation required by Section 84.6(c) or undertaken the remedial action contemplated therein.

affront any essential requirement (and indeed is likely present in all of nursing education anyway, for all students, disabled or not). The College failed to consider the modification and certainly it failed to carry its burden against the modification.[16]

III. Section 504 Requires, and the Regulation Properly Reflects the Requirement, that a Recipient Modify Its Program or Activity If Such Modification Is Necessary to Accommodate the Disabled Person and to Extend Meaningful Equality to Him

The equality to which one is thus entitled under Section 504 is, of course, not an *identity* of treatment but a functional, meaningful equivalence. "There is", Mr. Justice Frankfurter wrote, "no greater inequality than the equal treatment of unequals." *Dennis v. United States,* 339 U.S. 162, 184 (1950). The difference that a disability constitutes is real, the question is whether it is relevant to the program or function at issue, or whether through a modification, it can be rendered irrelevant. To treat a person with a hearing or other disability identically to a non-disabled person may be to deny him equal treatment. The converse, to treat him variably, according as his disability may require, may be exactly what is necessary to extend a meaningful equality to him.

As this Court wrote construing Title VI and the HEW Regulation thereunder in *Lau v. Nichols,* 414 U.S. 563, 566 (1974):

> [T]here is no equality of treatment merely by providing students with the same facilities, text books, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

16. Indeed, on this undeveloped record, it is uncertain whether any modification is necessary for Ms. Davis, let alone what its parameters may be. See Statement of the Case, *supra.* Hence, the Court of Appeals' remand.

> It seems obvious that the Chinese-speaking minority receives less benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program.

Similarly construing Title VII in *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971), the Chief Justice wrote:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proferred be one all seekers can use.

As to Section 504, the HEW Regulation, reflecting Congress' analysis of the historical problem and its purposes in enacting Section 504, recites:

> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to assure equal opportunity . . . . 42 Fed. Reg. 22676 (May 4, 1977).

The Analysis to the Regulation, Subpart A comment 6, 42 Fed. Reg. 22687 continues:

> "In this context, the term 'equally effective' . . . is intended to encompass the concept of equivalent, as

> opposed to identical, services and to acknowledge the fact that, in order to meet individual needs to the same extent that the corresponding needs of non-handicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary . . . . This standard parallels the one established under title VI of the Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols*, 414 U.S. 563 (1974)."

Whether Section 504's requirement of different or modified programs where necessary constitutes special treatment in any objectionable sense or in any sense at all is doubtful. As *Lau* and *Griggs* and Mr. Justice Frankfurter suggest, to treat a person variably, as his disability may require, is not necessarily to treat him, or any non-disabled person, unequally. Variability,[17] but functional equality, is a common characteristic of our world. Most programs and services (education, including higher education, and the practice of the professions certainly not excepted) are individualizing and individualized to a significant degree.

Indeed petitioner and its *amici*, if guilty of stereotyping disabled people and Ms. Davis and her hearing disability particularly, are no less guilty of stereotyping nursing and nursing education. The fact is that nursing—like most professions—and nursing education—like most education—is a highly variable activity leaving much room for individuation. Quite apart from the testament to the reasonableness, and the common occurrence, of the variation at issue here in Ms. Davis' case which arises from the fact that many deaf and hearing impaired people have completed nursing education and do practice effectively (let

17. While Section 504 requires that programs and services be different in form if necessary to be effective programs or services for disabled people, Section 504 prohibits separate services, unless necessary to be effective. Thus the HEW regulation: "the provision of unnecessarily separate or different services is discriminatory." 42 Fed. Reg. 22687 (May 4, 1977).

alone safely) as nurses,[18] the variation in education and in practice necessary to accommodate hearing-impaired people is well within the norms of variations in nursing.

The picture of nurses spending all their working hours in surgical masks in hospital operating rooms at the beck and call of the verbal commands of physicians. (Pet. Br. p. 9) is as accurate as the notion that all lawyers devote their entire practice to appellate argument, or criminal defense. The nursing profession and nursing education is full of variation and individualization. In addition to the acute hospital care setting that petitioner presents, the nurse may function in a neighborhood health center, group practice, extended care facility, mental health clinic, school or industrial setting. See, e.g. "Nurses Assume Bigger Role in Health Care", New York Times, March 25, 1979, col. 3. The functions and responsibilities in primary care, acute care and long term care vary greatly, as a Committee commissioned by Secretary of Health, Education and Welfare, Elliot Richardson reported:

> "In present practice the utilization of nurses varies extensively. Some are responsible for institutional areas of management and communication, such as inventory and supply, making requisitions for laboratory and other diagnostic and treatment services, routine charting and managing the flow of charts, and making appointments. A study reported by Yankauer, Connelly, and Feldman (*Pediatrics* 45:No. 3, Part II, March 1970) reveals that in pediatric practices nurses engage primarily in technical and clerical tasks along with such patient care activities as giving minor medical advice and information and interpreting instructions.

18. E.g., the Report of the Civil Service Commission (September 1978) showing 156 hearing-impaired nurses and 96 hearing-impaired doctors practicing in the federal government. *Los Angeles Times*, March 26, 1979, page 19, column 1.

Extending the Scope of Nursing Practice, A Report of the Secretary's Committee to Study the Extended Roles for Nurses, U.S. G.P.O., Washington (1971), p. 8.

Even in the hospital setting the nurse's job is varied and individualized. In the real world of nursing,

> ". . . the RNs are managers. We make decisions, keep records, pass medications, and coordinate, teach, and lead staff. Our main responsibility is to see that patients receive the right kind of care. Often that care is given by somebody else. If a patient needs instruction in a two-gram sodium diet, I get a dietitian to come up. If I learn that a patient who has had a leg amputated is being discharged to go home alone to a second-floor apartment, I call in one of the hospital social workers. Most bedside care is done by licensed practical nurses and nursing assistants. At Mother of Mercy no RN ever touched a bedpan." Anderson, P., *Nurse,* New York, St. Martins Press 1978, pp. 26-27.

And the surgical mask may never be worn and rarely seen. *Id.* at 219.

The variation of nurse roles and functions, and the emergence of specialties not only allows for modification and individuation in nurse training but demands it. Changing roles of nursing plus the variety of students applying for admission to schools of nursing (older men, veteran corpsmen, disadvantaged students, licensed practical nurses), Morton, D., Curriculum Design for the 1980's in *Curriculum Relevance in a Changing Health Care System,* New York National League of Nursing, 1975, p. 25, make the modification of program as suggested by the Circuit Court not a special modification for Ms. Davis but a modification as special as is required for nursing students generally.[19]

Whether the modifications required by Section 504 when

19. Similar individuation and variation is common, for example, in transportation, the service at issue in *Lloyd v. Regional Transit*

necessary to include disabled people constitute "affirmative action", and whether if it does, it is objectionable, is in large part a language game indulged by petitioner and its *amici.* As often in analogous civil rights matters, achieving the non-discrimination, the inclusion, the equality of benefit required by Section 504 involves particular positive or affirmative steps. Where overcoming the present effect of the weight and inertia of historic stereotype is the practical task, it is seldom satisfied by inaction. As simply put by Mr. Justice Blackmun (and much simpler to apply in this case than in *Bakke*) "I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. . . . [I]n order to treat some persons equally, we must treat them differently." *Board of Regents v. Bakke,* U.S. , 98 S.Ct. 2733 (1978). The Courts of Appeals which have given plenary consideration to Section 504 have characterized it and its regulations as creating "an affirmative duty on federal grant recipients." See *Lloyd v. Regional Transit Authority,* 548 F. 2d 1277, 1283 (7th Cir. 1977); *United Handicapped Federation v. Andre,* 558 F. 2d 413, 415 (8th Cir. 1977); see also *Halderman v. Pennhurst,* 446 F. Supp. 1295, 1323 (E.D. Pa. 1977). The HEW 504 Regulation and this Court in *Lau* and *Griggs* characterize the requisite action in the fashion recited above.

Among the clearest analyses of what is in point here and what is merely smoke and mirrors is the analysis of Section 504 by one of petitioner's *amici,* the American Council on Education, not in their Briefs to this Court but in one of the publications they have sponsored: Biehl, R., *Guide to the Section 504*

Authority, 548 F.2d 1277 (7th Cir. 1977). The height and width of doors to buses and of seats on them was chosen to accommodate a great diversity of individual sizes and shapes, girths and gaits among people. The claim of disabled people was that the additional reach necessary to accommodate them was no greater than the range already accommodated. They sought only equally individuated and accommodating buses. If the technology of buses would support such additional accommodation there, disabled people argued, Section 504 and the Urban Mass Transportation Act required it.

Self-Evaluation for Colleges and Universities, Washington, D.C. National Association of College and University Business Officers (1978).[20] The *Guide* states:

> "It should be pointed out that section 504 is not an 'affirmative action' statute and requires no goals or timetables.[21] There is no requirement that a college or university employ more (or attempt to employ more) qualified handicapped persons, or admit more (or attempt to admit more) qualified handicapped students. Section 504 is a 'nondiscrimination' statute that prohibits discrimination against existing employees, students, and applicants for employment or admission. However, in practice section 504 requires something between what is ordinarily defined as 'affirmative action' and 'nondiscrimination,' since, in the process of ensuring nondiscrimination, it requires certain actions beyond mere neutrality to be taken regardless of the presence of handicapped persons who might benefit. This principle of advance preparation to ensure nondiscrimination appears to go beyond the traditional concept of *laissez faire* nondiscrimination." *Guide,* p. 7.

That formulation offered by the college establishment and approved by the Office of Civil Rights as "an integral part of the Department of Health, Education and Welfare's effort to bring the best available technical assistance to recipients. . . .", *Guide* v, comports with the suggestion of the Circuit Court on affirmative relief.

IV. Section 504 Confers A Private Right of Action on Disabled People and Requires that A Judicial Remedy Be Available to Them

Throughout the legislative history of Section 504 the Congress emphasized that it attached the highest value to securing equal citizenship for disabled people and that it intended that Section 504 be effectively enforced. For example, in welcoming the addition of co-sponsors, Senator Humphrey said "It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced." 118 *Cong. Rec.* S9495 (March 22, 1972). Amending the definition of handicapped individual in Title V, the Senate Labor and Public Welfare Committee underscored its intention to reach all of the "many forms of potential discrimination" against disabled people. S. Rep. 93-1297 at p. 38; 1974 U.S. Code Cong. &

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20. This document published under a subcontract with American Council on Education is part of a larger technical assistance project.

The sponsorship of the American Council on Education in developing these 504 self-evaluation guidelines is noted on the inside cover of the *Guide.* The document is only one part of a sizable Department of Health, Education and Welfare technical assistance contract providing funds to the American Council for "Development of Training Materials, Training Workshops and Information Services to Assist Colleges and Universities in Providing Access for Handicapped Students and Employees." The Congress in the 1978 Amendments to Title V has authorized continued assistance to recipients to comply with Section 504, P. L. 95-602, sec. 120(a), 92 Stat. 2983, 29 U.S.C. Section 794b, and has authorized additional resources for colleges and other recipients to accommodate disabled persons. E.g., reader services for the blind, 92 Stat. 2975, 29 U.S.C. Section 777d; interpreter services for the deaf, 92 Stat. 2976, 29 U.S.C. Section 777e.

21. Section 504 and the HEW Regulation do appear to implicate "affirmative action" in its traditional sense of goals and timetables, see e.g., *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 311 F. Supp. 1002, 1009 (E. D. Pa. 1970), *aff'd* 442 F. 2d 159 (3rd Cir. 1971), *cert. denied* 404 U.S. 854 (1971), at three points, none of which are involved in this case. The Regulation, at Section 84.6(a), requires "remedial action" to overcome the effects of any discrimination found by the Director; at Section 84.6(b), it authorizes "voluntary action . . . to overcome the effects of conditions that resulted in limited participation . . . by handicapped persons"; and, at Section 84.6 (c), it requires a self-evaluation and "remedial steps to eliminate the effects of any discrimination that resulted from adherence to policies and practices." See Analysis to the Regulation, comments 9 and 10. The Congress said clearly that "where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." S. Rep. 93-1297 at page 39; 1974 Code Cong. & Admin. News 6390.

Admin. News 6389. Section 504, the Committee said, "is clearly mandatory in form" and explicitly, choosing words which have very particular meaning, the Committee declared Section 504 "would permit a judicial remedy through a private action." S. Rep. 93-1297 at p. 40-41; 1974 U.S. Code Cong. & Admin. News 6390-91.

The 1978 Amendments to Title V do not limit access to the courts as Petitioner suggests (Pet. Br. 60) but confirm the explicit legislative direction that judicial remedy (not judicial review) is available to enforce Section 504. The confirmation of legislative intent to authorize a private right of action is not found in the random remarks of Senators which "contribute little if anything to the search for legislative intent" (Pet. Br. 63) but is found in the explanation of the sponsor of the Amendment, Senator Cranston[22] and the well considered views of the Conference Committee.

In introducing Section 505(b) Senator Cranston said,

> ". . . the rights extended to handicapped individuals under title V of the Rehabilitation Act of 1973 . . . are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance.
>
> "To date we have permitted certain private enforcement of title V and yet we have not provided the means by which such private rights of action are meaningful. This amendment—providing attorneys' fees . . . will go a long way toward assisting long neglected Americans—handicapped individuals—in their full and equal share of the rights to which they are entitled." 124 *Cong. Rec.* S15591 (September 20, 1978).

Senator Cranston's language and intention were adopted by the Conference Committee. Senator Stafford, the ranking member of the Subcommittee on the Handicapped reporting to the Senate on the Conference bill stated:

> "The Amendment adopted by the Committee would help assure that handicapped individuals will have access to the judicial process in order to assert their rights under title V." 124 *Cong. Rec.* S19000 (October 14, 1978).

That the Congress intended and did create a private right of action is now beyond dispute. The legislative intent is explicit. This Court in *Campbell v. Kruse,* 434 U.S. 808 (1977) recognized the existence of a private cause of action by remanding to the district court "with directions to decide the claim based on the federal statute, Section 504 of the Federal Rehabilitation Act of 1973." Cf. *Lau v. Nichols,* 414 U.S. 563 (1974); *Board of Regents v. Bakke,* U.S. , 98 S. Ct. 2733 (1978).

Since this is an action against officials acting under color of state statute, custom, and usage, it arises under 42 U.S.C. Section 1983 and falls within the exceptions recognized in *Cannon v. University of Chicago,* 559 F. 2d 1063, 1083 (7th Cir. 1976), *cert. granted* U.S. , 98 S. Ct. 3142 (1978).[23]

It is perhaps the clarity of the legislative intention to create a private cause of action under Section 504 that leads petitioner to attempt to transmogrify a judicial remedy into a review of administrative proceedings. (Pet. Br. 63). While urging that Ms. Davis be required to exhaust administrative remedies, petitioner made no showing that any administrative remedy exists. In fact it is agreed that "the ultimate sanction . . . would be termination

22. The statements of a bill's sponsor as to legislative purpose are entitled to great weight. *National Woodwork Mfrs. Ass'n. v. N.L.R.B.* 386 U. S. 612, 640 (1967). A statement on the floor by a sponsor following his introduction of an amendment which is subsequently enacted is "clearly probative of a legislative judgment." *Simpson v. United States,* 435 U. S. 6, , 98 S. Ct. 909, 913 (1978).

23. The ambiguities in the legislative history implicated in *Cannon* do not exist in the 504 history. Compare comments of Rep. Railsback, 122 *Cong. Rec.* H12153, H12161 (Oct. 1, 1976) with Senator Cranston's remarks *supra.*

of federal funding [to the college]." (Pet. Br. 65). Hardly a remedial result for Ms. Davis.

The Circuit Court properly reserved any possible considerations of exhaustion or primary jurisdiction for the district court on remand. To the extent those doctrines have been developed in cases where administrative proceedings are provided for by statute, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, (1938), *McKart v. United States*, 395 U.S. 192 (1969), they are inapposite where no administrative proceeding to grant individual remedies is mandated by Congress, and where in fact the legislative history shows Congress intended judicial remedies.

CONCLUSION

For the above stated reasons the judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

THOMAS K. GILHOOL
FRANK J. LASKI
DEBORAH KAPLAN
JAMES J. RAGGIO
EDWARD A. STUTMAN
MICHAEL CHURCHILL
Public Interest Law Center
of Philadelphia
1315 Walnut Street, Suite 1600
Philadelphia, Pennsylvania 19107

Attorneys for *Amici Curiae*

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FOR ARGUMENT

In the Supreme Court of the United States

October Term, 1978
No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

78-711

BRIEF OF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF THE RESPONDENT

GEORGE DEUKMEJIAN, Attorney General
KATHERINE E. STONE, G. R. OVERTON,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2272

Attorneys for Amicus Curiae,
State of California.

Westside Law Publishers Santa Monica, California 213/451-1714

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In the Supreme Court of the United States

October Term, 1978
No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF THE RESPONDENT

AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of California by its Attorney General, George Deukmejian, respectfully submits this brief on behalf of the State of California as *amicus curiae* under the authority of Rule 42(4), United States Supreme Court Rules. This brief is submitted in support of the respondent Frances B. Davis.

INTEREST OF AMICUS CURIAE

In California "[t]he opportunity to seek, obtain and hold employment without discrimination because of . . . physical handicap . . . is . . . recognized as and declared to be a civil right." (Cal. Lab. Code § 1412).[1] California's strong public policy of eliminating barriers to equal opportunities for handicapped persons is also expressed in numerous legislative enactments. For example, California Government Code section 19230 declares that "[it] is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state and to engage in remunerative employment." California Civil Code sections 54 through 55.1 establish that physically disabled persons have "full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities and other public places." (Cal. Civ. Code § 54.) California Government Code sections 4450 *et seq.* establish minimum standards to facilitate access to public buildings by physically handicapped persons and California Health and Safety Code sections 19955 *et seq.* ensure that such standards apply to public accommodations constructed with private funds. Also, rapid transit equipment and structures must be built so as to be accessible to handicapped persons. (Cal. Gov. Code § 4500.)

Additionally, there are numerous federally funded programs and activities in California which may be

[1] See also, *Purdy & Fitzpatrick v. State of California* (1969) Cal.2d 566, 579 [79 Cal. Rptr. 77] ("Limitations on this right to work may be sustained only after the most careful scrutiny"); and *Serrano v. Priest* (1971) 5 Cal.3d 584, 604-608 [96 Cal. Rptr. 60] ("Education is a fundamental right.")

affected by this Court's decision.[2] California is vitally concerned that these programs and activities be efficiently administered in a manner that will discourage stereotyping of and encourage equal opportunities for handicapped individuals.

It is in accordance with these well established policies that the Attorney General of the State of California files this brief in support of the respondent.

STATEMENT OF THE FACTS

Amicus offers this summary of the key facts indicated in the lower courts' opinions:

Respondent, Frances B. Davis ("Davis") has been a duly qualified Licensed Practical Nurse in the State of North Carolina since 1967. During the 1973-74 academic year, Davis successfully completed the College Parallel program (designed as preparatory for entrance into the Associate Degree Nursing Program) at Southeastern Community College ("College"), a public institution which receives federal funds, (*Davis v. Southeastern Community College* (E.D. N.C. 1976) 424 F. Supp. 1341, 1342.)

Davis applied for and was denied admission to the Nursing Program on the basis that her hearing impairment [3]

[2] *E.g.*, the state university, college and community college system, student assistance grants and loans, low income housing assistance, revenue sharing SSI/SSP, and Medicaid, and regulation of nursing homes and hospitals.

[3] The audiologist's report indicated that Davis has a moderately severe loss in the right ear and a severe hearing loss in the left ear. She wears a hearing aid which improves her hearing to the outer limits of normal hearing levels and is well aware of gross sounds occurring around her. She is skillful in communicating with other people if she wears her hearing aid and is allowed to use her vision to aid her in interpreting the speech of others. (*Davis, supra,* 424 F. Supp. at 1343.)

disqualified her for the program. The single major factor in the College's refusal to allow admission to Davis was "*their feelings*" that she would be unable to serve as a Registered Nurse on completion of such a program." (*Id.* at 1343-1346, emphasis added.)

The trial court ruled against Davis' claims that the College had denied her equal protection of the law and due process in refusing her admission to the nursing program and held that although Davis is a "handicapped person" within the protection of 29 U.S.C. § 794 ("Section 504"), she was not subjected to discrimination under the statute because her hearing disability prevented her from being "otherwise qualified" for admission.[4]

The Court of Appeal vacated and remanded the trial court's judgment holding that the district court erred when it found that Davis was not "otherwise qualified" pursuant to Section 504 and further held that the College must reconsider Davis' application without regard to her hearing disability.[5] (*Davis v. Southeastern Community College* (4th Cir. 1978) 574 F.2d 1158, 1160.)

INTRODUCTION AND SUMMARY OF ARGUMENT

There are more than 13 million deaf or hearing impaired

[4]The trial court also held it was unnecessary to determine whether Davis was required to exhaust all administrative remedies, when even if she had additional administrative remedies, resort thereto would have proved futile. (*Davis, supra,* 424 F. Supp. at 1344.)

[5]The Fourth Circuit also held that Davis could pursue a private right of action under § 504 and affirmed the trial court's holding that administrative exhaustion would have been futile. (*Davis, supra,* 574 F.2d at 1160.) The Court of Appeal did not reach the constitutional questions. (*Id.* at 1161.) The appellate court also directed the trial court to consider Davis' claim that the College could be required to modify its nursing program so as to accommodate her and her hearing disability. (*Id.* at 1162.)

people nationwide.[6] Like other handicapped persons those with hearing disabilities have traditionally been subjected to discriminatory admissions policies and practices by colleges and universities. The purpose of Section 504 is to eradicate handicap discrimination by institutions receiving federal financial assistance and to ensure handicapped individuals equal access to all programs offered by such institutions.

Amicus offers the following arguments with the hope that this presentation will assist this Court in interpreting Section 504 in accordance with the letter and the spirit of the Rehabilitation Act of 1973 as amended. (29 U.S.C. § 701 *et seq.* ("the Act").

First, in order to identify and eliminate misconceptions about abilities of handicapped persons, it is crucial that the key term in Section 504, "otherwise qualified", as applied to college admissions be interpreted to preclude disqualification of individuals because of handicap. Amicus believes this construction is mandated by the constitutional principles of equal protection and due process underlying the statute's intent. Futhermore, it is in the public interest that traditional notions about the suitability of handicapped persons for particular occupations not bar individuals access to any college programs. Suppose, for example, Beethoven had been prevented from composing music once his hearing became impaired.

Secondly, the duty not to discriminate imposed by the statute implies a corresponding duty to reasonably accommodate the special needs of handicapped persons in order to neutralize the effect of any disabling condition. A prohibition against discrimination in college admissions is meaningless if a student can't get through the door or have lecture materials translated into usable form.

[6]*Persons with Impaired Hearing United States* (1971) HEW Publication No. (HRA) 76-1528, p. 1.

Thirdly, Amicus suggests that, although the administrative procedures specified in the recently promulgated regulations and amendments to the Act should normally be exhausted prior to seeking judicial relief, an exception should be made for Ms. Davis.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY CONSTRUED THE TERM "OTHERWISE QUALIFIED" TO PRECLUDE CONSIDERATION OF DAVIS' HANDICAP DURING THE ADMISSIONS PROCESS

A. The Court Of Appeal Was Correct In Remanding This Case In Light Of The Intervening Regulations.

The regulations of the Department of Health, Education and Welfare ("H.E.W."), promulgated to effectuate Section 504, make it clear that qualifications for post secondary education must be determined based on the applicant's academic and technical skills only. (45 C.F.R. § 84.3(k)(3).) Since the ability to hear is neither an academic nor technical skill essential to participation in the nursing program, the Fourth Circuit properly remanded the case in light of the applicable regulations which antedated the trial court's decision. (*United Handicapped Federation v. Andre* (8th Cir. 1977) 558 F.2d 413, 416.)

The entire scheme of the Section 504 regulations demonstrates that the trial court erred in focusing on Davis' hearing impairment during the admissions process. For example, section 84.42(4) provides that administrators of post secondary educational programs and activities, including post secondary vocational programs and activities, "may not make preadmission inquiry as to whether an applicant for admission is a handicapped person" except for purposes of taking remedial action to correct the effects of past discrimination. (45 C.F.R. § 84.42(4).) This prohibition applies to every form an applicant is asked to submit, including medical forms. After admission, inquiry may be made on a confidential basis as to handicaps that may require accommodation. (*Ibid.*)

Title 45 Code of Federal Regulations Section 84.43(c) provides:

> "A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity."

H.E.W.'s analysis of regulation explains that:

> " . . . This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or *assumptions by the recipient that no job would be available in the area in question for a person with that handicap.*" (45 C.F.R. § 84, Appendix A, p. 388, emphasis added.)

The College violated the letter and the spirit of the above regulations in evaluating Ms. Davis' application for admission to the nursing program. Unlike other applicants, she was subjected to a pre-admission special hearing test which was reviewed by the Director of the State Board of Nursing. The Director's opinion with respect to Davis' ability to serve as a Registered Nurse after graduation was the single major factor in the college's denial of her admission. (*Davis, supra,* 424 F. Supp. at 1343-1344.) This is exactly the type of disparate treat-

ment of handicapped persons section 504 was intended to eliminate. The regulations make it clear that the lower court "erred by considering the nature of Ms. Davis' handicap in order to determine whether she was 'otherwise qualified' for admittance to the nursing program." (*Davis, supra,* 574 F.2d at 1161.)

B. Principles Of Equal Protection And Due Process Should Be Considered In Construing Section 504.

Congress has found that "[i]t is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution be provided to all individuals with handicaps." (88 Stat. 1631.) It is necessary to focus on an applicant's qualifications without regard to handicap to avoid invidious discrimination and to promote equal opportunity for handicapped persons. It is therefore pertinent to consider the constitutional policies embodied in the due process and equal protection clauses in interpreting Section 504. (See *Toth v. Quarles* (1955) 350 U.S. 11, 15.)

1. Stereotyping of Handicapped Persons Is Repugnant to Equal Protection Principles and Section 504.

The trial court found that the single major factor in the College's refusal to allow admission to Davis was "*their feelings* that she would be unable to serve as a Registered Nurse on completion of the program." (*Davis, supra,* 424 F. Supp. at 1346, emphasis added.) It should be noted in passing that their feelings do not appear to be founded on objective data or even a fair evaluation of Ms. Davis' potential to function as a Registered Nurse. Indeed,

hearing impaired and even deaf persons are currently employed in health care occupations.[7] Moreover college administrators' feelings regarding Davis' suitability to be a Registered Nurse are not strictly relevant to the issue of whether she is qualified for the college program. It must be emphasized that this is not an employment discrimination case; it is a discrimination in education case.[8] As pointed out above, colleges may not refuse admission based on an assumption that no job would be available in the area in question for a person with a handicap.

What is relevant, however, is that their feelings may be based on stereotyped notions about the suitability of handicapped persons for certain occupations. Such preconceptions are repugnant to the United States Constitution. Section 504 was obviously designed to overcome stereotyping of handicaped persons. Only by requiring that an applicant's qualifications be considered without regard to handicap, can discrimination because of stereotyping be overcome.

The petitioner urges that Section 504 be interpreted to "approve and perpetuate" a principle used by Mr. Justice Bradley in *Bradwell v. The State* (1872) 83 U.S. (16 Wall.) 130 to sanction such stereotyping. (Pet. Br. p. 30.) In *Bradwell,* Justice Bradley rationalized the refusal of a state to allow women to practice law as follows: "The

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[7]For example, the federal government currently employs over 300 persons with hearing impairments as nurses and as nursing assistants. (U.S. Civil Service Comm. Report, *Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government,* September 30, 1978; see also, Owens, Redden and Brown, *Resource Directory of Handicapped Scientists,* AAAS Publication No. 78-13 for a listing of handicapped persons employed in various health care occupations.)

[8]The Bona Fide Occupational Qualification (BFOQ) type arguments asserted by petitioner, such as the blind bus driver, are therefore beside the point. (Pet. Br. pp. 40-41.)

natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." (*Id.* at 141.) Fortunately this type of gross stereotyping, based on physical distinctions between the sexes, has been discredited. (See for example, *Frontiero v. Richardson* (1973) 411 U.S. 677, 684-685.)

Like women, handicapped persons have been traditionally subjected to discrimination because of immutable characteristics.[9] Many of this Court's criteria for determining what constitutes a suspect class for purposes of equal protection analysis apply to the handicapped who are "a class . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such position of political powerlessness as to command extraordinary protection from the majoritarian political process." (*San Antonio School District v. Rodriquez* (1972) 411 U.S. 1, 28; see also *Fialkowski v. Shapp* (E.D. Pa. 1975) 405 F. Supp. 946, 958-959, and *In Interest of G.H.* (N.D. 1974) 218 N.W. 2d 441, 446-447.)

It was with a sensitivity to the difficulty of overcoming ingrained societal discrimination against handicapped people that Congress fashioned the statute. As Senator Williams observed:

> "The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us . . . In their quest to achieve the benefits of society they ask no more than equality of opportunity. But they are faced with continuing discrimination.
>
> ". . . Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of historical separation of our handicapped population. We have isolated them so that they have become unknown to the communities and individuals around them." (118 Cong. Rec. 3320-3321 (1972) Remarks of Senator Williams.)

[9]See, Burgdorff and Burgdorff, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect" Class Under the Equal Protection Clause* (1975) 15 Santa Clara Lawyer 855.

To focus on the person's handicap under Section 504 would indeed "approve and perpetuate" the anachronistic assumptions relied on in the *Bradwell* case and by petitioner. Amicus urges that Section 504 be interpreted in accordance with equal protection policies.

2. Due Process Principles Are Relevant to Interpreting Section 504.

a. The Liberty to Pursue One's Chosen Occupation Is A Significant, If Not Fundamental Interest.

As early as 1915 this Court declared that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." (*Truax v. Raich* (1915) 239 U.S. 33, 41; see also *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 369; and *Takahashi v. Fish Comm'n* (1948) 334 U.S. 410, 416.)

Ms. Davis has not only been denied the opportunity to pursue her chosen occupation solely because of her handicap, she has been denied the opportunity to become

educated in that field. The importance of education has been often recognized by this Court. (*See e.g., Brown v. Board of Education* (1954) 347 U.S. 483, 493 and subsequent cases.) The liberty of the handicapped to pursue these two significant interests depends upon a proper construction of Section 504.

b. Due Process Disfavors General Assumptions of Physical Inability to Perform A Job.

Ms. Davis was rejected for the nursing training program because of her handicap without having been afforded an opportunity to prove that she could perform, the assumption being that deaf and hearing impaired people cannot perform as nurses. But as pointed out at note 7, *supra,* hearing impaired and even deaf people can and do function as nurses. Ms. Davis has qualified as a practical nurse for many years (*Davis, supra,* 424 F. Supp. at 1342); even petitioner admitted she would be able to perform adequately in some nursing positions. (*Id.* at 1346.)

In *Cleveland Board of Education v. La Fleur* (1974) 414 U.S. 632, this Court invalidated presumptions that pregnant women and women who have recently given birth are physically incapable of teaching school. Likewise in *Gurmankin v. Castanzo* (E.D. Pa. 1976) 411 F. Supp. 982, the trial court found that the school district's refusal to consider blind persons to be teachers for sighted students violated the plaintiff's due process rights. (*Id.* at 991-992.)

As were the plaintiffs in *La Fleur* and *Gurmankin,* Ms. Davis has been denied the opportunity to demonstrate her ability to do a job because of general assumptions about her physical disability. Due process principles require that Ms. Davis' qualifications be assessed without regard to her handicap so that she can be afforded an equal opportunity to demonstrate her abilities.

II.

REASONABLE ACCOMMODATION IS CONCOMITANT WITH THE DUTY NOT TO DISCRIMINATE ON THE BASIS OF HANDICAP

A. The Concept of a Duty To Accommodate Is Incorporated Into Section 504.

It is not entirely accurate to characterize the duty to accommodate imposed under Section 504 as "affirmative action." (See Pet. Br. pp. 47-56.) The phrase connotes a system of preferential admissions for handicapped persons, for which there is little evidence Congress intended to require under Section 504. There is, for example, no requirement in H.E.W.'s regulations that institutions of higher education establish goals or quotas for the admission of handicapped students. Certainly no one has suggeted that colleges must reduce their academic standards for such persons. Thus the charge that the appellate court's decision infringes upon academic freedom is wholly spurious. (Pet. Br. p. 56.)

A full and fair reading of the statute, regulations and commentary can lead only to the conclusion that the goal of the positive duty imposed under Section 504 is to simply neutralize the handicapping condition in order to allow equal competition.

That Congress has always intended reasonable accommodation to be part of the regulations issued by H.E.W. is apparent from the committee commentary.[10] For example, the Senate report submitted in connection with the 1974 amendments to the Act specifies that "[w]here

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[10]The subsequent and contemporaneous comments of Congress to the enactment of a provision may properly be considered in reaching a conclusion as to the meaning Congress wished to attach to a statute. (*Red Lion Broadcasting Co. v. FCC* (1968) 395 U.S. 367; *Algoma Plywood Co. v. Wis. Board* (1948) 336 U.S. 301.)

applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." (1974 U.S. Code, Cong. & Admin. News, p. 6390, Senate Report on Pub.L. No. 95-516), and demonstrates the long reach Congress intended the statute to have. The absence of any attempt by Congress to restrict the positive duties described in H.E.W.'s regulations is further evidence of its intention to impose such obligations on colleges. Clearly, Congress had the opportunity while considering the 1978 amendments to the Act to limit the effect of the regulations. Congress did limit the scope of affirmative conduct it chose to impose on the federal government as an employer, but did not limit the scope of the Section 504 regulations.[11]

H.E.W.'s analysis of the regulations make it clear that reasonable accommodation to the needs of individual students is required by Section 504. For example, the analysis of Title 45 Code of Federal Regulations section 84.44(a) provides:

> "Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic

[11]Considerable debate attended consideration of the 1978 amendments in the House of Representatives. However, not one comment can be found in the record even so much as intimating that H.E.W. had exceeded its authority by requiring "reasonable accommodation" under Section 504.

To the contrary, during the Senate debates over the 1978 amendments, a great deal of criticism was leveled at the broad accommodation duty formerly required by what is now Section 501 of the Act. Senator McClure introduced two amendments to limit the scope of accommodation required by the federal government as an employer. The debate clearly underscored the Senators' understanding of the duty of reasonable accommodation, generally and specifically under Sections 501 and 503 of the amended Act. Yet, no effort was made to further restrict the regulations issued by H.E.W., except as to employment. (124 Cong. Rec. 15664-15667 (1978).)

> requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation does not obligate an institution to waive course or other academic requirements. *But such institutions must accommodate those requirements to the needs of individual handicapped students.*" (Emphasis added.) (45 C.F.R. § 84, Appendix A, p. 388.)

B. Judicial Decisions Support The Requirement of Reasonable Accommodation.

Several lower courts have found that Section 504 incorporates a duty to accommodate. In *Lloyd v. Illinois Regional Transportation Authority* (7th Cir. 1977) 548 F.2d 1277, the Seventh Circuit found that Section 504 and the regulations pursuant thereto placed an affirmative duty on the mass public transportation system to refrain from designing or placing into operation any new federally funded facilities unless the facilities were accessible to all mobility-disabled persons. The court held that Section 504 establishes "affirmative rights" (*Id.* at p. 1285) and remanded to the district court to review what relief could have been afforded the handicapped plaintiff class. (*Id.* at pp. 1287-88.)

Similarly, in *United Handicapped Federation v. Andre, supra,* 558 F.2d 413, the Eighth Circuit, citing *Lloyd,* held that the transit commission, which had purchased new buses with federal aid, had the burden of taking affirmative action to conform to regulations and guidelines requiring that such mass transit equipment be made fully accessible to all handicapped persons, pursuant to Section 504. The financial burden upon the recipient did not prelude a finding in keeping with the Act. "Although the buses in question have been purchased and placed in

service, because of recent developments [subsequent promulgation of H.E.W. guidelines] the defendants now have the burden to take affirmative action to conform to the regulations and guidelines." (*Id.* at p. 416.)

In *Hairston v. Drosick* (S.D. W.Va. 1976) 423 F. Supp. 180, the district court for the Southern District of West Virginia held that the exclusion of a minimally handicapped child from the regular public classroom without a bona fide educational reason is a violation of Section 504. The court concluded that "[t]o deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such program in violation of the statute. School officials must make every effort to include such children within the regular public classroom situation, *even at great expense to the* school system." (*Id.* at p. 184.)

Barnes v. Converse College (D. S.C. 1977) 436 F. Supp. 635 and *Crawford v. University of North Carolina* (M.D. N.C. 1977) 440 F. Supp. 1047 were actions under Section 504 which required federally funded private colleges to provide and pay for interpreters for deaf students.

In *Barnes,* plaintiff was a deaf English teacher who was required by the State Department of Education to earn additional college units to maintain an "out-of-field" permit to teach in the public schools. Plaintiff required an interpreter to participate in classroom activities and sought to have the college provide funds for such interpreter. The court found that plaintiff had a "probable right" under which she could recover and that "refusal to grant plaintiff relief . . . would defeat any rights she may have . . . and would cause her immediate and irreparable injury in the form of loss of employment." (*Barnes, supra,* 436 F.2d at 638.) The *Barnes* court, while sympathetic to the cost factor, observed that "the danger of future expenditures under this statute is not a proper consideration in this lawsuit." (*Ibid.*)

Similarly, in *Crawford*, the court held that a state supported university was required to provide a deaf graduate student with the services of an interpreter. After balancing the financial burdens to both parties, the court held that it had "no doubt that the University would be better able to pay the costs." (*Crawford, supra,* 440 F. Supp. p. 1059.)

In conclusion, the duty to reasonably accommodate imposed upon recipients under Section 504 is an affirmative right of the handicapped. Specific cost factors might be considered in connection with the factual question of what is reasonable accommodation by the district court on remand, but they are not pertinent to the issue before this Court: whether Section 504 imposes a duty of reasonable accommodation.[12]

III.
A PRIVATE RIGHT OF ACTION IS INTENDED UNDER SECTION 504

The issue of whether there is a private right to seek legal redress under Section 504 has occasioned lengthy comment in the briefs of petitioner and the *amici curiae*

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[12]The court's *de minimus* interpretation of the duty to accommodate to the religious practices and beliefs of an employee in *Trans World Airlines v. Hardison* (1977) 432 U.S. 63, is not analogous to a college's duty to accommodate to a student's physical handicap under Section 504. (See *Holland v. Boeing Co.* (Wash. S.C. 1978) 18 FEP 37, a case arising under a Washington state law involving a cerebral palsy employee where the *de minimus* effort test was not applied.)

supporting petitioner.[13] Some confusion has resulted from these arguments, especially where analogies to employment discrimination against handicapped persons have been drawn. We reiterate and cannot state too strongly that the case before the bar is not an employment discrimination case.

A. Congress Has At All Times Intended A Private Right Of Action Under Section 504.

It is clear that a private right of action under Section 504 has always been contemplated by Congress. In order for this Court to reach a just result in this matter, the issue of a private right of action should be considered in two steps. The first consideration being the status of the private right as currently established in the law; the second, the status of the private right at the time Davis commenced her action in the district court.

In order to fully appreciate the view taken below, consideration should be given the remedial character of the Act and the 1978 amendments. The clear purpose of Congress in 1973 is stated in Title 29 United States Code section 701, which lists various goals sought to be accomplished, each directed at improving, assisting or in some manner providing for the needs of handicapped persons.[14] The comments in the House Report on the

[13]Amici C. Br. of 32 States, pp. 23-27; Pet. Br. pp. 61-62.

[14]29 U.S.C. § 701 states in full:

The purpose of this chapter is to provide a statutory basis for the Rehabilitation Services Administration, and to authorize programs to —

> "(1) develop and implement comprehensive and continuing State plans for meeting the current and future needs for providing vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals, serving first those with the most severe handicaps, so that they may prepare for and engage in gainful employment;
>
> "(2) evaluate the rehabilitation potential of handicapped individuals;
>
> "(3) conduct a study to develop methods of providing rehabilitation services to meet the current and future needs of handicapped individuals for whom a vocational goal is not possible or feasible so that they may improve their ability to live with greater independence and self-sufficiency;
>
> "(4) assist in the construction and improvement of rehabilitation facilities;
>
> "(5) develop new and innovative methods of applying the most advanced medical technology, scientific achievement, and psychological and social knowledge to solve rehabilitation problems and develop new and innovative methods of providing rehabilitation services to handicapped individuals through research, special projects and demonstrations;
>
> "(6) initiate and expand services to groups of handicapped individuals (including those who are homebound or institutionalized) who have been underserved in the past;
>
> "(7) conduct various studies and experiments to focus on long neglected problem areas;
>
> "(8) promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment;
>
> "(9) establish client assistance pilot projects;
>
> "(10) provide assistance for the purpose of increasing the number of rehabilitation personnel and increasing their skills through training; and
>
> "(11) evaluate existing approaches to architectural and transportation barriers confronting handicapped individuals, develop new such approaches, enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals."

1978 amendments stated that the purpose was to ". . . extend and strengthen programs authorized under the

Rehabilitation Act of 1973 . . . . " (1979 U.S. Code and Admin. News at p. 7490.)

Moreover, civil rights legislation is generally considered remedial in nature and, as such, provisions like Section 504 should be construed liberally in order to reach the goals sought by the Legislature. (*Ham v. Rock Hill* (1964) 379 U.S. 306.) In analyzing Section 504, this principle suggests that a private right of action was intended to enforce the right of nondiscrimination specified by Congress.

The Senate Report on the 1974 amendments to the Act are particularly compelling with respect to Congressional intent to afford a private right of action under the statute. The report discusses the history and intent of Congress as to Sections 503 and 504 at length, stating in part:

> "Section 504 was patterned after, and is almost identical to the anti-discrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, and Section 901 of the Education Amendments of 1972, 42 U.S.C. 1683. This Section therefore constitutes the establishment of a broad governmental policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedure, *but it is clearly mandatory in form, and such regulations and enforcement were intended.*" (Emphasis added.)

The report continues, stating:

> "This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process . . . as well as relative ease in implementation, and *permit a judicial remedy through a private action.*" (1974 U.S. Code, Cong. & Admin. News, at pp. 6390-6391, emphasis added.)

The 95th Congress has further strengthened the right to a private judicial remedy under Section 504 and continued to act in a manner consistent with the above quoted remarks. The 1978 amendments to the Act, especially the addition of Section 505(b), which empowers the courts to " . . . allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs" (1979 U.S. Code Cong. and Admin. News at pp. 2982-2983, Pub.L. 95-602), can only be read to mean that implicit within Section 504 is the right of an aggrieved person to seek judicial redress.

The affirmance of the private right of action as indicated above is tempered somewhat however, by the amendments' provisions found in Section 505(a)(2), which limit one's remedies, procedures and rights to those accorded under Title VI of the 1964 Civil Rights Act. (42 U.S.C. 2000d; see also, 45 C.F.R. §§ 80 *et seq.*, 45 C.F.R. §§ 81 *et seq.*) (*Ibid.*) Thus, a private judicial remedy is clearly intended under Section 504, but only after an administrative investigation, review, and hearing process.

The foregoing discussion is important in this case, but in a limited sense. Ms. Davis brought this action prior to the effective date of the 1978 amendments to the act, and even before H.E.W.'s regulations went into effect on June 3, 1977. (42 Fed.Reg. 22677, May 4, 1977; *Davis, supra,* 574 F.2d at 1163, n.9.) This means that there was neither any express statutory acknowledgment by Congress that a private right would lie, nor was there any adminstrative

scheme by which Davis could seek relief. The questions most squarely before this Court then are whether Davis had a private right to bring the instant action prior to the 1978 amendments to the Act and whether she should now be be barred or forced to start all over because of her failure to exhaust a then nonexistent administrative remedy.

B. Davis Had A Right To Bring A Private Action Prior To The 1978 Amendments To The Act.

As set forth above, Section 504 should be accorded a liberal interpretation in order to implement the goals sought and eradicate the evil addressed by Congress. Moreover, based solely upon the history of Section 504, it is consistent and logical to find that a private right of action exists. Petitioner's argument that Congress never intended to allow private persons to enforce Section 504, or at least not until regulations were promulgated, defies logic. It is beyond belief that Congress would offer Section 504 to handicapped persons as at best an empty promise of non-discrimination.

Should this Court find the above insufficient to establish a private right to sue, amicus believes the *Cort v. Ash* (1974) 422 U.S. 66 analysis employed by the Court of Appeal in *Lloyd v. Regional Transportation Authority, supra,* 548 F.2d 1277, is most persuasive.

The *Cort* analysis applies to this case as follows: First, Davis is clearly a handicapped person within the meaning *of Title 29 United States Code sections 706(b) and 794. (Davis, supra,* 424 F. Supp. at 1345.) Second, there is express legislative intent that a private remedy be granted individuals. (As noted in *Lloyd, supra* at 1285-1286, Congress clearly intended judicial enforcement of Section 504, *albeit* in a post-administrative hearing context.) Third, as observed in *Lloyd,* it is not unreasonable to

imply a remedy from the terms of the statute. The last consideration in the *Cort* test is whether the area which Davis seeks to enforce is traditionally relegated to state law. This was of concern in *Cort* because of the state's long history of adjusting rights between corporate directors and stockholders, the topic in that case. (*Cort, supra,* at 68, 84.) There is no parallel in the instant case. The federal judiciary has a well known interest in protecting the civil rights of individuals and has not hesitated to do so in circumstances such as these. The provisions which Davis seeks to assert are merely a younger generation of a long-established federal policy.

C. Davis Should Not Be Required To Exhaust An Administrative Remedy Which Did Not Exist At the Time She Filed This Action.

The lower courts found that it would have been futile for Davis to process her grievance further with the College. Since she filed this action however, a scheme for processing such complaints with H.E.W. has been promulgated.

The decision in *Cort, supra,* was limited by the instance of an intervening statutory and regulatory change, similar to that occurring in this case (implementation of the H.E.W.'s regulations and the 1978 amendments to the Act). (*Cort, supra,* at 74-76). This Court noted that a change in law which occurs while a case is on appeal should be considered by the reviewing court. (*Cort, supra,* at 76-77, citing *United States v. The Schooner Peggy* (1801) 5 U.S. (1 Cranch) 103.) If applied in this case, this rule would require Davis to start anew by filing an administrative complaint, awaiting the results, and then if the results are unfavorable, filing a private action in the district court. Such a procedure would be manifestly unjust and wasteful.

Amicus believes the exception to *The Schooner Peggy*

rule, acknowledged by this court in *Bradley v. Richmond School Board* (1974) 416 U.S. 696, is appropriate in this instance. In *Bradley,* this court observed that when an intervening change in law would cause a manifest injustice, and certain other elements were present, a court should not apply the change in the law. (*Id.* at 716; see also *Thorpe v. Housing Authority* (1969) 393 U.S. 268; *Greene v. United States* (1964) 376 U.S. 149.) Elements that should be considered in applying the exception include: (a) the nature and identity of the parties; (b) the nature of their rights; and (c) the nature of the impact of the change in law upon these rights. (*Bradley, supra,* 416 U.S. at 717.)

In *Bradley,* the litigation took place between a school board and class of minority children to establish the rights of the entire class. The court noted the vast resources of the school board which contended that applying an intervening change in the law relating to attorney's fees would be unjust. (*Id.* at 718.) The instant case is a matter of private litigation to adjust the rights of an individual, Davis. The expense and delay for Davis, should she be required to commence this matter anew, can only be considered very burdensome.

The second element of the exception is not wholly applicable to this case and should be viewed as neutral. In *Bradley,* the court considered whether injustice would occur by infringing upon a right that had matured or become unconditional. (*Id.* at 720.) Neither party in this matter has any right which is presently matured such that application of the exception would injure either side.

The third *Bradley* consideration is whether by allowing the exception, a new and unanticipated obligation would be placed upon a party without an opportunity to be heard. (*Id.* at p. 720.) Clearly, remand of this case to the district

court places no additional burden on the College. The College would bear the same burden if it had to justify its actions before an administrative tribunal.

Furthermore, the application of the exception would be narrow and limited to the facts of this case, where a private action is commenced prior to promulgation of an administrative scheme. Claims arising under Section 504 since the effective date of the regulations, June 3, 1977, should adhere to the format of administrative investigation, hearing, and judicial review, set forth in the regulations and 1978 amendments to the Act,[15] since Congress clearly intended that the now-available comprehensive administrative remedy be pursued wherever possible. (1979 U.S. Code Cong. and Admin. News, at 6390-6391; Pub.L. 95-602, § 505(a)(2).)

CONCLUSION

For the foregoing reasons, Amicus respectfully urges that the Court of Appeal's decision be affirmed.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General
KATHERINE E. STONE,
G. R. OVERTON,
Deputy Attorneys General
Attorneys for Amicus Curiae

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[15]Amicus believes that this case represents a narrow exception to the requirement of exhaustion of administrative remedies. But for the foot dragging of H.E.W., the issue of the right to sue presented by *Davis* would not have occurred and the problems presented by this case may have been avoided. (See, 1974 U.S. Code, Cong. and Admin. News at p. 6391, Senate Report on Pub.L. 93-516, and *Cherry v. Mathews* (D. D.C. 1976) 419 F. Supp. 922.)

FOR ARGUMENT

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

-against-

FRANCES B. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE FOR THE NEW YORK CITY COUNCIL OF ORGANIZATIONS SERVING THE DEAF, DISABLED IN ACTION OF METROPOLITAN NEW YORK, LTD., NEW YORK CITY MAYOR'S OFFICE FOR THE HANDICAPPED, EASTERN PARALYZED VETERANS ASSOCIATION, UNITED CEREBRAL PALSEY OF NEW YORK CITY, AND THE LEGAL AID SOCIETY OF NEW YORK CITY

KALMAN FINKLE
Attorney-in-Charge
The Legal Aid Society of New York City
Civil Division

JOHN E. KIRKLIN
Director of Litigation
TIMOTHY M. COOK
Of Counsel
The Legal Aid Society of New York City
Civil Appeals and Law Reform Unit
11 Park Place, 8th Fl.
New York, N.Y.
(212) 227-2755

March 31, 1979

Counsel for Amici Curiae

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

-against-

FRANCES B. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE FOR THE NEW YORK CITY COUNCIL OF ORGANIZATIONS SERVING THE DEAF, DISABLED IN ACTION OF METROPOLITAN NEW YORK, LTD., NEW YORK CITY MAYOR'S OFFICE FOR THE HANDICAPPED, EASTERN PARALYZED VETERANS ASSOCIATION, UNITED CEREBRAL PALSEY OF NEW YORK CITY, AND THE LEGAL AID SOCIETY OF NEW YORK CITY

INTERESTS OF AMICI

Pursuant to Rule 40 of the Rules of the Supreme Court,[1] the amici file this brief in support of the respondent, Frances B. Davis, by reason of their substantial interest in the outcome of this

1. Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

case. Amici are all non-profit organizations having among their purposes the promotion of the civil and human rights of all people with disabilities and the elimination of discriminatory practices against disabled persons in education, employment, housing, public accommodations, and transportation.

Amicus The New York City Council of Organizations Serving the Deaf was founded in 1971 to bring together many well-established organizations of and for deaf persons.[2] The Council works for the

2. These include Eastern Oral Deaf Adults Section--New York City, Ephpheta Society for the Catholic Deaf, Inc., Fanwood Alumni Association, Hebrew Association for the Deaf, International Catholic Deaf Association of New York Chapter #11, International Catholic Deaf Association Chapter #15, JHS #47 Alumni, Knights and Ladies Del'Epee, Maimondes Community Mental Health Center for the Deaf, Mental Health Association of the Deaf, Metro Camera Club for the Deaf, Metro Chapter of the Gallaudet College Alumni Association, New York Catholic Deaf Center, New York Civic Association of the Deaf, New York League for the Hard of Hearing, New York Society for the Deaf, NYRID Metro (Registry of Interpreters for the Deaf), P.T.C. of JHS #47

development of educational, economic, social, cultural, and other opportunities for all hearing impaired persons. Affiliates have been particularly active in the advocacy of improved educational services for hearing impaired children and young adults in New York City. The Council counts as members of its affiliated groups severely deaf persons who are currently engaged in or have completed educational programs in the area of health delivery, including some who are now practicing physicians, dentists, and nurses.

Amicus Disabled In Action of Metropolitan New York, Ltd., is an organization consisting primarily of -- and directed by -- people with disabilities dedicated to improving their legal, social, and economic condition so that they may

Manhattan, St.Ann's Church for the Deaf, St. Francis de Sales School for the Deaf, St. Joseph's School for the Deaf, and Union League of the Deaf.

achieve complete integration into society. Disabled In Action's specific areas of concern include abolishing discrimination against people with disabilities in such areas as education, employment, housing, public accommodation, and transportation; combating paternalistic attitudes toward disabled people by public and private agencies and institutions; and eliminating the social ostracism that separates disabled people from the mainstream of society. Among its other legal advocacy activities, Disabled In Action was one of the amici in Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977), the first decision by a court of appeals to be decided pursuant to section 504.

Amicus New York City Mayor's Office for the Handicapped was established in 1972 in order to create a coordinated, effective effort toward the solution to problems impacting upon the New York dis-

abled community. The Office directs its efforts toward formulating and implementing progressive policies for handicapped persons on behalf of the City Administration; combining the energies and resources of informed citizens, community leaders, professionals, and handicapped citizens themselves in the finding of solutions to pressing problems; developing a comprehensive legislative program fitted to the needs of handicapped persons; providing an accessible, centrally located information, consultation, counseling, and referral service for the City's handicapped persons; coordinating existing programs and services for handicapped citizens within the City Administration; and utilizing all available media in a public education program to inspire an informed and concerned public attitude toward the handicapped community and to inform handicapped citizens of their rights as individuals.

Amicus Eastern Paralyzed Veterans Association was formed thirty-two years ago as a chapter of the Paralyzed Veterans of America. Its main purpose then and today is to ensure that their members are not denied their legal rights. The Association's Legislative and Barrier-Free Design Departments have joined forces with other disability groups in order to ensure the enforcement of federal and state laws and regulations guaranteeing equal rights for disabled citizens in education, housing, public transportation, employment, and access to public buildings and facilities. Recent endeavors have particularly involved section 504 compliance activities. Association staff have provided on-site inspections and technical assistance to dozens of educational institutions in the New York area; prepared a "Fact Sheet on Section 504" for distribution to recipients of federal financial assistance; served as workshop leaders and panelists at

a number of seminars on section 504 compliance; and published a two-volume guide for compliance with the program accessibility requirements of section 504 and other laws, entitled Barrier-Free Design: The Law.

Amicus United Cerebral Palsy of New York City is the area chapter for United Cerebral Palsy of America. The group is active in sponsoring educational, vocational, recreational, and counseling services for persons disabled by cerebral palsy. Present advocacy efforts in the area of education by the organization presently include litigation pursuant to section 504 and the Education for Handicapped Children's Act to eliminate the segregation of students with cerebral palsy by the New York City Board of Education. UCP v. Board of Educ., No. 79 C 560 (E.D.N.Y., complaint filed March 6, 1979).

Amicus The Legal Aid Society is a private, not-for-profit organization incor-

porated under the laws of the State of New York for the purpose of rendering legal representation and assistance to persons in New York City who are without adequate means to employ other counsel. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of persons who are disabled, including many hearing impaired persons, and the questions involved in this case are of great importance to those disabled persons seeking to benefit from programs and activities in receipt of federal financial assistance. The issues raised in this appeal are of vital concern to The Legal Aid Society in its efforts to assist fully disabled persons who are subjected to discrimination. Attorneys from the Legal Aid Society are currently representing indigent disabled persons pursuant to section 504 in class action litigation involving rights to education, New York State Association for Retarded

Children, Inc. v. Carey, Nos. 72 - C-356-57 (E.D.N.Y., slip opinions of September 14, 1978 and February 28, 1979), and employment, Chaplin v. Consolidated Edison Co. of New York, No. 79 Civ. 730 (S.D.N.Y., complaint filed February 14, 1979). They are also serving as counsel to disabled students' groups at Hunter College, New York University, and Yeshiva University, in negotiations to bring postsecondary programs at those schools into compliance with section 504.

All amici thus have an obvious and immediate interest in the issues before this Court.

QUESTION PRESENTED

Whether the court of appeals held correctly that, consistent with the civil rights provisions of the Rehabilitation Act, petitioner must make an individualized determination as to the abilities of a hearing impaired applicant to meet the essential admissions criteria for

petitioner's educational program, without regard to that applicant's hearing impairment?[3]

STATEMENT OF THE CASE

Ms. Frances B. Davis, the respondent herein, is a licensed practical nurse (¶ 5)[4] residing in North Carolina (¶ 2). Ms. Davis has a moderately severe hearing loss in her right ear and a severe hearing loss in her left ear (¶ 7). She wears a hearing aid to assist her hearing (id.). This hearing aid improves her hearing to the outer limits of normal hearing levels (id.). In addition, Ms. Davis is an excellent lip reader and, overall, is skillful in communicating with

3. Questions regarding the availability of a private right of action, of a meaningful administrative remedy that might first have to be exhausted, and of "affirmative relief" as a function of the nondiscrimination mandate of section 504, are adequately addressed in the Brief for Respondent, which positions are adopted by amici by reference.

4. Paragraph numbers refer to the Findings of Fact reported in the district court opinion, 424 F. Supp. at 1342-44.

others (id.).

Ms. Davis applied for admission to the Associate Degree Nursing Program at Southeastern Community College, petitioner herein, for the fall quarter beginning in September, 1974 (¶ 4). She was required to undergo a pre-admission examination by an audiologist in order to determine the extent of her hearing impairment (¶ 7).[5] Relying solely on the audiologist's report,[6] the Executive Director of the North Carolina Board of Nursing advised the College's Director of Nursing that Ms. Davis would be unable to adequately attend to a patient's needs as a registered nurse (¶ 8). Similarly relying on the audiologist's report, as well as the advice of the Board of Nursing that Ms. Davis would never be able to be a regis-

5. The Findings of Fact do not indicate whether all applicants are required to undergo such an examination.

6. The audiologist himself evidently made no recommendation regarding the ability of Ms. Davis to enter the nursing program.

tered nurse, the College denied Ms. Davis' application for admission (¶ 9).

Prior to this decision, neither the Board of Nursing nor the College attempted to determine whether there were any essential criteria for admission that could not be met by this applicant. Nor did they attempt to determine whether there were any specific tasks essential to the program that could not be successfully and safely performed by this applicant. The decision was instead based solely on (1) the bare "findings of the medical tests" conducted by the audiologist (id.), and (2) "their feelings" that a hearing impaired person could never be a registered nurse even if she could complete the program (id.).

Following her receipt of the rejection letter from the College, Ms. Davis asked that this decision be reconsidered (¶10). A committee of nurses reviewed Ms. Davis' file and sustained the decision of

the College (id.). After unsuccessfully requesting that this decision be reconsidered a second time (id.), Ms. Davis instituted the present action.

Witnesses for the College asserted that there might be situations in which a hearing impairment could render a nurse unable to safely attend to the needs of a patient (¶ 8).[7] There evidently was no showing, however, that it would be essential to the successful completion of the education program for a student nurse to be placed in such situations.[8] Nor was there any showing that current levels of

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7. The witnesses raised, for example, the possibility of an operating room nurse being unable to lip read because of the use of surgical masks (¶ 8), totally ignoring the use of auxiliary aids such as see-through masks, and without showing that the experiences of student nurses were coextensive with those of registered nurses.

8. The testimony seemed to indicate that only registered nurses would be faced with the hypothetical situations (¶ 8).

supervision provided to students should not be sufficient to alleviate the College's concerns. Nor was there any showing that the provision of academic adjustments or auxiliary aids could not alleviate the College's concerns. Indeed, far from focusing on Ms. Davis' particular abilities to meet the curriculum requirements of the training programs,[9] the district court concluded "from the testimony that the single major factor in the defendant's refusal to allow admissions [sic] to plaintiff was her projected inability to be licensed as a Registered Nurse after graduation . . ." 424 F. Supp.

9. Petitioner, in its Argument, now attempts to construct additional situations in which hearing impaired registered nurses might not be able to perform adequately, Pet. Bf. at 44 n. 18, and to extend the Findings of Fact with regard to registered nurses to the experience of student nurses, id. at 34. Even if there were testimony in the record supporting these assertions--and there was none--it would be incompetant and irrelevant absent a link to Ms. Davis' specific ability to adequately function in an educational context.

at 1346.[10]

The district court ruled in favor of the College on the basis that Ms. Davis was, as a matter of law, not qualified to participate in the nursing program. Since there was at the time an "absence of prior legal definitions of this term,"[11] the Court felt obligated to "resort to" Webster's Dictionary in order to define "otherwise qualified" to mean that "no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person

10. On this point, too, the testimony was mixed: It was admitted at trial that Ms. Davis, with accommodation, could perform adequately in some fields of nursing. 424 F. Supp. at 1346. No evidence was introduced with regard to the experience of other nursing schools in the education of hearing impaired students. Nor did the College evidence any examples of any deleterious effects upon patients due to the inability of hearing impaired health professionals to adequately meet patients' needs.

11. The interpretive regulation for section 504 was published in the Federal Register on May 4, 1977, antedating the district court's opinion by approximately four months.

unable to fully and effectively participate in the activity." Id. at 1345 (emphasis provided).

A unanimous panel of the Court of Appeals for the Fourth Circuit reversed and remanded on this issue, holding that the College must consider Ms. Davis' application without regard to her hearing disability; i.e., petitioner must evaluate her on the basis of specific abilities in light of her objective qualifications, and must consider the impact of academic adjustments and auxiliary aids on her overall qualifications. 574 F. 2d at 1160, 1162. Basing this holding upon the standard required by the newly promulgated regulation[11] implementing section 504, id. at 1161, the appellate court indicated that the focus instead should be upon the particular abilities of Ms.Davis to safely and effectively meet any essential admissions criterion of the College. Id. at 1160. In making this determination,

"[t]he College may consider such other relevant subjective and objective factors as it deems appropriate..." Id. The court additionally observed that:

> In the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly the plaintiff could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities.

Id. at 1161 n.6.[12]

Finally, the appellate court noted that the College may be required under the section 504 regulation, in order to avoid discriminatory treatment, to grant some form of "affirmative relief" to Ms.

12. Similar findings have been made in nationwide surveys of deaf persons. Today it is not uncommon to find deaf students performing safely and effectively in health training programs and deaf employees performing safely and effectively in health care professions. See pages 23-28 infra. The need for more disabled persons such as hearing impaired persons in the health professions recognized by the court of appeals has been noted elsewhere.

Davis. Id. at 1162. The district court was then instructed to take evidence, on remand, germane to an appropriate application of the regulation.

SUMMARY OF ARGUMENT

Given the opportunity, hearing impaired students are able safely and effectively to complete the essential educational requirements to be registered nurses. Specific evidence is available from examples of severely disabled persons, including several hearing impaired persons who are members of the amici, and from reports throughout the nation of disabled persons now realizing their potential, educationally and occupationally, despite the entrenched remnents of discriminatory policies and practices that historically have excluded them from full participation in the American experience. Following the leads of other minorities,

disabled persons have demanded--and received--legislative recognition of their need for civil rights guarantees. Statutory protection has come in the form of title V of the Rehabilitation Act of 1973, section 504 of which mandates, inter alia, equal educational opportunities for disabled persons. Section 504 is based squarely upon title VI of the Civil Rights Act of 1964, and extends the rights guaranteed under that title to disabled persons.

The administrative construction of section 504, relied upon correctly by the court of appeals below, requires that a postsecondary institution evaluate applicants on the basis of academic and technical standards, e.g., aptitude tests, grades, or residency requirements. A college may not exclude a student from its program because of its assumptions about the nature of applicants' disabilities vis-a-vis their abilities to undertake particular

activities.

This requirement that admissions committees look beyond the stereotypes associated with various disabilities is supported amply by the legislative history of section 504. In addition, the Rehabilitation Act as a whole, and its legislative history, confirms this mandate. Finally, the consistent judicial construction of section 504 by the federal courts also sustains the holding of the court of appeals.

ARGUMENT

THE COURT OF APPEALS HELD CORRECTLY THAT THE CIVIL RIGHTS PROVISIONS OF THE REHABILITATION ACT REQUIRE THAT PETITIONER MAKE AN INDIVIDUALIZED DETERMINATION AS TO THE ABILITIES OF A HEARING IMPAIRED APPLICANT TO MEET THE ESSENTIAL ADMISSIONS CRITERIA FOR PETITIONER'S EDUCATIONAL PROGRAM, WITHOUT REGARD TO THAT APPLICANT'S HEARING IMPAIRMENT.

Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, speaking on the floor of Congress in support of a bill that was to become section 504 of the federal Rehabilitation Act, stated the rationale of that law:

> The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us.... In their quest to achieve the benefits of society they ask no more than equality of opportunity. But they are faced [13] with continuing discrimination....

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13. 118 Cong. Rec. 3320 (1972). Similar statements were made throughout the legislative history of section 504. See, e.g., 119 Cong. Rec. 24563, 24566, 24587, 24589, 24590 (1973); 118 Cong. Rec. 8976,8977, 35840,35841 (1972).

This legislative purpose informs the decision of the court of appeals below, and requires that the holding of that court be affirmed.

A. Hearing Impaired Students Are Able Safely and Effectively to Complete the Essential Educational Requirements to Be Registered Nurses and Other Health Care Professionals; They Have Been Excluded from these Professions in the Past Because of Discriminatory Educational Opportunities.

The late Chief Justice Earl Warren, writing for this Court in Hernandez v. Texas, 347 U.S. 475 (1954), stated:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.

Id. at 478. Hearing disabilities are such a difference -- although community prejudices about hearing, and other, disabled people have been ubiquitous. They are as ancient and persistent as prejudices based

upon race or color. Yet, it has only been in recent times that disabled people have been in a position to seek the Court's and the law's protection.[14]

In this case, Frances Davis asks the Court to enforce the civil rights mandates of the Rehabilitation Act, which pierce the stereotypes associated with hearing disabilities, and which demand that petitioner assess Ms. Davis application for admission on a factual basis, according to her abilities, without regard to her hearing impairment. The College's justifications for its discriminatory action are contradicted by the established fact that presently -- and in increasing numbers -- hearing impaired persons, nationwide, are safely and successfully enrolling in nursing schools, dental schools, and even in medical schools. A report made

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14. It took nearly 200 years and 2,500 decisions before this Court decided its first civil case concerning the legal rights of disabled people. O'Connor v. Donaldson, 422 U.S. 563 (1975).

five years ago based upon the National Census of the Deaf Population states:

> Deaf persons are employed in all principal occupations ....there are fewer deaf lawyers, doctors and dentists--though there are some of each--than would be expected from their numbers in the general population. That there are even a few successful deaf persons in these professions demonstrates that such employment is feasible.

J. Shein & M. Delk, The Deaf Population Of The United States 81 (1974).

Numerous hearing disabled persons, including members or former members of groups represented by amicus The New York City Council of Organization Serving the Deaf, have successfully entered careers as health care professionals.[15] For example, Dr. Phillip Rosenblatt was

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15. Certainly information that there were no hearing impaired persons employed within the health professions or attending health related educational programs would not be relevant. However, the fact that there are such persons amply demonstrates the invalidity of the College's position.

born deaf. He successfully completed medical school and a pathology residency at Jewish Memorial Hospital in New York City. He is now in private practice in Brooklyn. Mary Anne Weeks, R.N., holds a full-time position at New York Hospital, a division of Cornell Medical Center. Her severe hearing impairment did not prevent her from completing a three year nurse-training program, nor from working at her job, which involves rehabilitation nursing. Erica Herzig, R.N., is severely hearing impaired. Yet, she has received her Bachelor of Science degree from the School of Nursing at Columbia University. Dr. Frank Hochman's congenital deafness was not an insurmountable problem at Rutgers Medical School. He is adept at lip-reading and he uses a stethosope with a built-in amplifer. He has since moved to the west coast,

where his pediatric practice at San Jose Hospital includes a patient population that is fifty per cent hearing impaired. His ability to use sign language saves his patients the trouble of writing down their symptoms, a practice that is commonly necessary -- and burdensome -- when hearing impaired patients must rely upon hearing physicians.

Further examples of the successful participation of hearing impaired persons in health related areas are easy to find. For instance, scholarship grantees of the Alexander Graham Bell Association for the Deaf are listed in the organization's newsletter, The Volta Review. Many of the recipients of these grants are successfully participating in educational opportunities that would be closed to them at Southeastern Community College. Maraz Elizabeth Paget of Northampton, Massachusetts, despite a

congenital hearing loss as well as a heart defect, is a sophomore at the University of Massachusetts Nursing School. Steven L. Rattner of Silver Spring, Maryland, a student at the University of Maryland Dental School, is the author of "The Way It Looks to Me: Views of an Integrated Student," a chapter in The Hearing Impaired Child in a Regular Classroom: Preschool, Elementary, and Secondary Years. Having completed her second year at Emory University School of Medicine in Atlanta, Susan Feder's professor of anatomy said he would rank her among his top three students in terms of competence. Ms. Feder uses an electronic stethoscope to compensate for her hearing loss. Ann Keenan Ogden, R.N., from Rosalia, California, was severely deafened as a result of chicken pox at the age of three. Ms. Ogden works in the advanced care and rehabilitation unit at Memorial Hospital Medical Center in Long Beach, California

with patients, age 18 to 100 years, who are learning to cope with the effects of total joint implantation, stroke, paraplegia, and quadriplegia. As a staff nurse, she is responsible for patient care and treatment, which includes communication with patients and their families in an attempt to meet psychological and spiritual, as well as physical, needs. She is a graduate of a three-year program at St. Anthony's School of Nursing in Rockford, Illinois.
1977 Volta Rev. 403; 1976 Volta Rev. 300.

Similarly, persons with other severe disabilities have achieved success in various health professions that the stereotyped image of those disabilities would deny them. David Hartman, M.D., for example, is currently pursuing his psychiatric residency at the University of Pennsylvania Hospital. Mr. Hartman is totally blind. Yet he successfully pursued the full four-year curriculum,

including assistance with pre- and post-operative care, at Temple University Medical School. See Bennett, A New Issue for Medical Schools: The Handicapped as Physicians, Phila. Inquirer, Nov. 12, 1978, at 3-M.

Sheila Braunstein is studying to become a physician at the University of Southern California School of Medicine despite the fact that she will spend the rest of her life in a wheelchair due to an injury to her spinal chord. See id.

Joseph Panzarella, M.D., has been a quadraplegic since the age of two. He is one of the staff physicians at Brunswick Hospital, Amityville, New York, and is also affiliated with Franklin General Hospital, Valley Stream, New York. He specializes in rehabilitative medicine, and teaches a course in that subject at New York University Medical School. Dr. Panzarella was recently named "Physician of the Year" by the American Medical Association.

Thus, the facts now indicate that hearing disabled persons, and other severely disabled persons, can safely and effectively pursue educational programs in the health professions. Indeed in recent years the number of hearing impaired persons enrolling in post-secondary institutions, including health-training programs, has mushroomed. This results partially from the significant improvements in the technology of hearing aids[16] and partially from the change in emphasis in the

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16. Hearing aids have been improved dramatically within the past decade. As technology continues to develop, "about every five years a complete revolution is accomplished." M. Rubin, Hearing Aids: Current Developments and Concepts xiii (1976). In addition, hearing impaired children are being identified much earlier and professionals are concerning themselves with their habilitation much sooner. See Meadow, Personality and Social Development of Deaf Persons, in Psychology of Deafness for Rehabilitation Counselors 67, 68 (B. Bolton, ed., 1976).

service provision sections of the federal Rehabilitation Act of 1973 in giving priority vocational services to those disabled persons who have severe disabilities, including hearing impaired persons.[17] Perhaps the most

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17. As early as 1943, Congress included higher education within the concept of rehabilitation. See Pub L. No. 78-113. That law defined "vocational rehabilitation" and "vocational rehabilitation services" as "any services necessary to render a disabled person fit to engage in a remunerative occupation" Id. In fiscal year 1975, sponsorship in college programs accounted for over forty percent of vocational rehabilitation expenditures for training services, nationwide. Hearing impaired persons, among other groups of disabled persons, have been thought to be too severely handicapped to effectively benefit from rehabilitation services. See Adler & Williams, Services to Deaf People in the Seventies, in Educational and Psycho-Social Aspects of Deafness (R. Hardy & J. Cull, eds., 1974). Rehabilitation caseworkers often have been disposed to divide their clients into what they consider promising or hopeless cases, directing their efforts toward the former group which usually does not include hearing impaired persons. See generally Dembo, The Utilization of Psychological Knowledge, in Rehabilitation & Welf. Rev. 1 (1970). In

significant factor, however, is what one commentator has labeled the Zeitgeist -- the spirit of the times.[18] Demands for nondiscriminatory admission requirements at colleges and universities followed from the demands by other minority groups for economic and social justice, including equal access to edu-

the Rehabilitation Act of 1973, on the basis of its finding that such practices were not justified, Congress required that priority be given in vocational rehabilitation services, including sponsorship in higher education programs, to severely handicapped persons. 29 U.S.C. §§ 701(1),721(a)(5), 741(a),750(a),762(a),772(b),774(b). The Act includes "deafness" in its definition of severe handicap. Id. at § 706(12). Thus, the Rehabilitation Act of 1973 demonstrates that Congress had firmly in its consciousness the counter-stereotype fact that severely disabled persons can successfully participate in educational programs such as that offered by the petitioner. See Cook, The Provision of Health and Rehabilitation Services to Disabled Persons Under the Rehabilitation Act, 12 Clearinghouse Rev. 693, 698-99 702 (1979).

18. Quigley, The Deaf Student in Colleges and Universities, in Educational and Psychological Aspects of Deafness 95, 96 (R.Hardy & J. Cull, eds., 1974).

cational opportunities at all levels. While the initial demands came mostly from black persons, other minorities, including deaf persons and other disabled groups became part of this movement.[19] They began to recognize that when disabled persons are subjected to discrimination in the provision of

19. Id. at 97. It was the disabled students programs initiated in the late sixties at several colleges and universities that established the critical mass of persons needed to address the issues of communication, mobility, and attitudinal barriers confronting students on campuses. The ability of disabled students to join together and deal effectively with these and other issues, has, in turn, given rise to their advocacy efforts and participation in projects directed towards influencing and changing conditions on college campuses and in the community. Thus, higher education for handicapped persons is not only of value to such individuals themselves, but also must be considered a matter of top priority for the multitude of unsatisfied needs of handicapped persons in general. See Laski, Legal Rights in Higher Education, Rehabilitation, and Employment: Some Notes and Thoughts for Disabled Students, in E. Gollay & A. Bennett, The College Guide for Students with Disabilities 3 (1976); Hessler, College Education for the Severely Disabled, 1 American Rehabilitation 29, 31 (1976).

educational services and activities, the effect is often that they are underemployed throughout their lives. See Sen. Rep. No. 1297, 93rd Cong., 2d sess. 36 (1974).[20] It is significant

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Although a number of studies have found employers, because of invalid assumptions, reluctant to hire hearing impaired workers for any jobs, see e.g., Rickard, et al., Indices of Employer Prejudice Toward Disabled Applicants, 47 J. Applied Psych. 52 (1963) (deafness rated as worse than tuberculosis or mobility impairment requiring use of wheelchair); see also Williams, Is Hiring the Handicapped Good Business? 1972 J. Rehabilitation 30, the more serious concern is that of underemployment. See J. Schein & M.Delk, supra page 23 ,at 84-85 (noting correlation between lack of education and underemployment among deaf workers); Williams & Sussman, Social and Psychological Problems of Deaf People, in Counseling with Deaf People (A. Sussman & L. Steward, eds., 1971) ("employed deaf people are very often seriously underemployed....we find deaf men and women of normal or above average abilities operating automatic machines, performing simple assembly line operations, or otherwise occupied in unchalleging routines. This stereotyping illustrates the inadvertent discriminatory attitudes toward deaf job applicants that are inevitable among slightly informed professionals when relating to this or another small minority

to note that although these individuals as a whole constitute well over ten percent of the population of the United States, id at 34, disabled persons, a significant number of whom have hearing disabilities,[21] make up a very negligible

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that has very complex characteristics."); Stahler, Underemployment, in The Deaf Man And the World 33 (R. Jones & K Stevenson, eds., 1969) ("The deaf... quickly reach a plateau, and there they remain. As a result, underemployment is so prevalent as to become a major problem for most deaf people who are capable and interested in working....").

21.

Approximately five percent of the total population in this country are persons handicapped by a significant bilateral hearing loss. About two million of them cannot hear and understand conversational speech. The ongoing National Census of the Deaf Population, which defines a deaf person as one who has lost, or never had, the ability to hear and understand speech through the unaided ear, such loss to have occurred prior to nineteen years of age, tentatively reports a prevalence rate for deafness of two per one thousand. It is estimated there are over 450,000 individuals who fit into this category. See J. Schein & M. Delk, supra page 23; Adler & Williams, supra note 17. Thus, hearing impairment is "one of the most prevalent

percentage of the students at colleges and universities. The even greater limitation on the number of disabled individuals in graduate and professional schools dramatically explains their limited participation in the economic life of the nation.[22] Thus, the recent history of the drive to eliminate discrimination in education on the basis of race and sex provides a firm foundation to build

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chronic conditions in the United States." Testimony of E.B. Perrin before the Sub-Committee on Government Regulation of the Senate Select Committee on Small Business (May 20, 1975). In addition, because of environmental factors, the incidence of nerve loss which causes hearing impairment in the general population seems to be increasing. Report of the Environmental Protection Agency, presented to the Ear, Nose and Throat Panel of the Food and Drug Administration (June 30, 1975).

22. Gavin, Who Disables the Disabled? 5 Chem. Tech. 716 (1975); E.Collay & A. Bennett, supra note 19. The underrepresentation of deaf persons in professions that require advanced degrees has been documented in A. Crammatte, Deaf Persons in Professional Employment (1968).

upon in the effort to eliminate discrimination on the basis of disability. See Adams v. Richardson, 480 F.2d 1159 (D.D.C.1973). To the extent that education significantly affects hearing disabled persons' outlook toward and station in society, equality in the provision of educational opportunities would seem to be fundamental to that equality in other areas of life.[23] However, hearing disabled persons have been looked upon historically as being less deserving of the benefits of education.[24] Those training opportunities that have existed have been largely con-

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23. See, e.g., Hairson v. Drosick, 423 F. Supp. 180, 183 (S.D.W.Va.1976).

24. Such prejudice dates back to ancient Greece, when Aristotle prescribed death for hearing impaired offspring because of his assumption that there was a common organic relationship between hearing impairments and speech impairments, and that hearing impaired persons were incapable of education. See Hetherington,

fined to institutionalized settings, so that hearing impaired persons have been forced to submit to segregation in order to learn even a minimal way of life. The same era that invented Jim Crow laws to segregate people by race provided institutions for hearing impaired persons and other disabled persons -- and in a remarkably similar spirit.[25] These attitudes unfortunately remain with us today. Studies designed to

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Amplification in the Educational System, in Amplification for the Hearing Impaired 373 (A. Pollack, ed., 1975); Burgdorf & Burgdorf, A History of Unequal Treatment: Qualifications of Handicapped Persons as a "Suspect" Class Under the Equal Protection Clause, 15 Santa Clara L. 855, 883-84 (1975).

25. Compare C. Vann Woodward, The Strange Career of Jim Crow, vii-viii, 94-96, 97ff. (2d rev. ed. 1966) with Burgdorf & Burgdorf, supra note 24, at 887. See L. DiCarlo, The Deaf 29-42 (1964). See also N. Kittrie, The Right to Be Different 56-58, 308-35 (1971); G. Allport, The Nature of Prejudice (1958); Karst, Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L.Rev. 1,5-8, 9-10 (1977).

measure the degree of social distance that people keep between themselves and particular groups have found a strong association between intolerance toward racial minorities and intolerance toward disabled persons.[26] Hearing impaired persons especially are subjected

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26. See, e.g., J. Simmons, Deviants 27-32 (1969). For the unaccustomed, interactions with disabled persons instill apprehensions that, in turn, produce reactions defining them as a sub-class of social deformity. See E. Schur, Labeling Deviant Behavior: Its Sociological Implication 109 (1971). See also J. Lofland, Deviance and Identity 13-15 (1969). Psychological studies indicate that the reason for such a reaction is simply a fear springing from ignorance or lack of contact with disabled persons. B. Wright, Physical Disability-- A Psychological Approach 264-65 (1960). It is easy to classify all persons evincing conspicuous differences as physically "defective" and sociologically "deviant." Such classifications represent no more than the vestiges of the more blatant biases of earlier societies. See notes 24 & 25, supra; tenBroek & Matson, The Disabled and the Law of Welfare, 54 Calif.L.Rev. 809,813 (1964).

to the same type of stigma experiences as are ethnic minorities and aliens.[27] The standard perception of hearing persons is that hearing impaired, and other disabled persons do not have the ability to offer rewarding contributions to the

27. Language difficulties of hearing impaired persons are usually assumed to be an indication of a lack of intelligence. A. Ciammatte, supra note 22, at 8. The wearing of hearing aids is especially looked upon by many hearing impaired people as a "stigma symbol" -- i.e., the different treatment they receive when they wear their hearing aids causes hearing impaired persons to be aware of what others consider to be an inferior condition. This causes hearing impaired persons to internalize the idea that they are indeed inferior. Sanders, Hearing Aid Orientation and Counseling, in Amplification for the Hearing Impaired 323, 343 (A.Pollack, ed., 1975); Ramsdell, The Psychology of the Hard of Hearing and Deafened Adult, in Hearing and Deafness (C. Silverman, ed., 3d ed., 1970). See E. Goffman, Stigma: Notes on the Management of Spoiled Identity 7,104 (1963). Stigma terms, such as "deaf and dumb," are still commonly verbalized as a source of metaphor and imagery, without thought to their actual definitions. Thus, a wide range of imperfections are imputed on the basis of a single impairment. Id. at 5,115.

community through social interaction.[28] Yet hearing disabled organizations have been politically weak and unable to coalesce with other disabled groups as a potent force to utilize the political system to actively change these perceptions.[29]

28. See Karst, supra note 20, at 6-10 See also P. Blau, Exchange and Power in Social Life (1964).

29. The Senate Report on the Rehabilitation Act Amendments of 1974 stated:

> More than any other minority group, individuals with handicaps have been affected by policy decisions at every level of government which are developed all too frequently without their continued participation. Until this Nation has the foresight to include in all of its planning the need to make all areas of society accessible and usable to individuals with handicaps, they will continue to be excluded and will have little or no opportunity to achieve their basic human right of full participation in life and society.

S. Rep. No. 1297, supra page 33, at 24: Further, it has been noted that:

> [D]isabled persons have generally a poor and meagre press. They are victims of a social science elitism that makes the dullest academic

Although discriminatory practices certainly occur in many arenas,[30] such treatment is perhaps more harmful when it develops in the context of education, the conduit through which the means to live in a democracy have traditionally been provided. See Brown v. Board of Education, 347 U.S. 483 (1954). That, at least, is the legislative judgment -- by voting section 504 into existence Congress recognized the enormity of the problem of disability discrimination in higher education and the urgency of implementing broad re-

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exercise on disability more publishable than an account of the pressing needs of handicapped persons.
J. Stubbins, Social and Psychological Aspects of Disability 9 (1977).

30. See generally J. Raggio, The Disabled and the Elderly: Equal Access to Public Transportation (1975); Cook, Nondiscrimination in Employment Under the Rehabilitation Act of 1973, 27 Am. U.L. Rev.31 (1977); Comment, Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled, 61 Geo.L.J. 1501 (1973).

forms in order to enable hearing impaired people -- and all disabled people -- to be defined, as a matter of public policy, by their abilities, and not by their disabilities.[31]

B. Section 504 Prohibits Petitioner from Denying Admission to a Hearing Impaired Applicant Absent a Determination as to the Abilities of that Applicant to Complete the Essential Admissions Criteria for Petitioner's Educational Program, Without Regard to that Applicant's Hearing Impairment.

In the exercise of its powers under § 5 of the fourteenth amendment to enforce equal protection of the laws,[32] Congress passed title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d(1970), in order to

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31. See F. Bowe, Handicapping America 24 (1978).

32. Katzenbach v. Morgan, 384 U.S.641, 648 650 (1966); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 816 n.12 (3d Cir. 1978). See also Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975).

assure that equal education opportunities were not denied on the basis of race, color, or national origin.[33] Similarly, Congress guaranteed equal educational opportunities for women with the adoption of title IX of the Education Amendments of 1972. 20 U.S.C.§1681 (West Supp. 1977).[34] In 1973, acting with

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33. Title VI provides:

> No person in the United States, shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

34. Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or subjectected to discrimination under any education program or activity receiving Federal financial assistance.

With both title VI and title IX, the issue is civil rights, and the battle

the same clear purpose, Congress enacted section 504, 29 U.S.C. §794, popularly known as the Disabled Persons' Civil Rights Act. Congress used exactly those words used in title VI and title IX, and extended the equality guarantee therein[35] to include

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to claim the rights guaranteed under those statutes has recently been fought before this Court. See Board of Regents of the Univ. of Cal.v. Bakke, 98 S.Ct. 2733 (1978); Cannon v. Univ. of Chicago, 559 F. 2d 1063 (7th Cir.1976), cert. granted, 98 S. Ct.3142 (1978), argument reported, 47 U.S.L.W. 3471 (Jan.16,1979).

35. See, e.g., Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2733, 2745 (1978)(Powell J.) Bossier Parrish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir.1967), cert. denied, 388 U.S. 911 (1967); United States v. Jefferson County Board of Educ., 372 F. 2d 836, 848 (5th Cir.1966). See generally Fiss, The Fate of an Idea Whose Time Has Come: Anti-Discrimination Law in the Second Decade After Brown v. Board of Education, 41 Chi. L.Rev. 742,771 (1974).

The legislative history of section 504 shows the explicit intention of Congress to impose by statute the same guarantees of equal protection required by title VI and title IX. See, e.g., S.Rep.No.1297 supra page 33, at 18-19; 120 Cong. Rec. 30551 (1974). See also 42 Fed. Reg.22676 (May 4, 1977). This legislative intent was

all handicapped individuals. Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in §706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....[36]

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recently codified in section 120 of the 1978 amendments to the Rehabilitation Act, which provide that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available... under section 504...." Pub. L. No. 95-602, 92 Stat. 2983 (to be codified under 29 § U.S.C. §794a(a)(2))(Nov. 6, 1978).

Thus, the same high standard of review applied to classifications based upon race, color, religion, and national origin under title VI must be applied to classifications based on handicap under section 504. Indeed, the federal courts have already noted that section 504 "closely tracks" title VI. Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1280-84 (7th Cir. 1977), cited with approval in Regents v. Bakke, 98 S. Ct. at 2744 n.16 (Powell, J.), 2815 n. 27 (Stevens, J) ; Accord, Sherer v. Waier 457 F.Supp.1039,1044 (W.D.Mo.1978) ("similarity of § 504 to § 601...was not accidential"); Barnes v. Converse College, 436 F. Supp. 635, 638 (D.S. Car. 1977) (title VI and section 504 "substantially identical"); Halderman v. Pennhurst State School and Hosp., 446 F.Supp.1295, 1323-24 (E.D. Pa.1977); Crawford v. University of North Carolina, 440 F.Supp. 1047, 1055 (M.D.N.C. 1977); Drennan v. Philadelphia Gen. Hosp., 428 F.Supp. 809, 815 (E.D.Pa.1977). As Senator Humphrey, floor manager of the Civil Rights Act of 1964, said of title VI during debate, quoting President Kennedy's message forwarding the Act:

> simple justice requires that public funds...not be spent in

> any fashion which encourages, entrenches, subsidizes or results in racial discrimination.

110 Cong. Rec. 6543 (1964) (emphasis supplied), quoted with approval in Regents v. Bakke, 98 S.Ct. at 2811 n.16 (Stevens, J.).

The only exception to this principle is that title VI exempts from its coverage some forms of employment discrimination, see 42 U.S.C. § 2000d.(3), whereas section 504 contains no exemptions, and, indeed, has as its basic purpose the expansion of opportunities in all areas of employment, as well as education. See S.Rep.No. 1297, supra page 33, at 16-19; 119 Cong. Rec. 24563,24566,24563 (1973); S.Conf. Rep. No. 455, 94th Cong., 1st Sess.54 (1975). See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-17 (1975) (courts are to look to the "large objectives of the Act"); A.H. Phillips v. Walling, 324 U.S. 490, 493 (1945 (exemptions from remedial legislation must be narrowly construed). But see Trageser v. Libby Rehabilitation Center, 18 F.E.P. Cases 1141 (4th Cir. 1978).

36. Section 706(6) defines "handicapped individual" as:

> [A] person who (A) has a physical or mental impairment which sub-

The court of appeals held that section 504 requires "that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability," 574 F.2d at 1160, indicating that it was simply unnecessary for petitioner to look beyond Ms. Davis specific abilities -- it could utilize any "relevant subjective and objective factors as it deems appropriate,"[37] -- so long as it did not exclude her from its program because of her handicap. Id.

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stantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

29 U.S.C. §706(6). It is unquestioned that respondent falls within this definition. Pet. Bf. at 8 n.1 ;424 F.Supp. at 1345.

37. Utilization of such factors must be "consonant of course with a fair and essential uniform application of those same subjective and objective factors utilized in the consideration of other candidates for enrollment in the nursing program." 574 F.2d at 1160.

In enacting section 504 Congress required that discrimination against disabled people in educational programs be ended, and prohibited exclusions of disabled persons from educational programs because of stereotyped assumptions about their inability to participate in such programs.

These commands of section 504 when applied to the facts of this case require precisely the judgment and relief ordered by the court of appeals below, that petitioner evaluate Ms. Davis' qualifications without "considering the nature of the plaintiff's handicap in order to determine whether or not she was otherwise qualified for admittance to the nursing program...."
574 F.2d at 1161.

The predicate of Congressional enactment of section 504 was Congress' recognition of the competences of disabled

people and of the conditions necessary to the realization of their competences and to their participation as equal citizens. The Congress acknowledged the principles of normalization and acted upon them. It understood and indeed intended that section 504 would open educational opportunities heretofore closed and would require new services. Exclusion of disabled people from such opportunities was the evil Congress legislated to overcome, as the administrative construction of Section 504, the legislative history of section 504, the purpose and history of the Rehabilitation Act as a whole, and the consistent judicial construction by the federal courts of section 504 all demonstrate.

1. The Administrative Construction of Section 504

The construction of section 504 by the Department of Health, Education and

Welfare in its regulation,[38] 45 C.F.R. part 84, shows that section 504 was intended to end discrimination due to stereotyped conceptions of the abilities of disabled persons[39] by prohibiting the exclusion of disabled persons from educational programs without the showing, on a factual basis, that they are unable to meet the standards requisite to admission to those programs without regard to their disabilities.

38. Exec.Order No.11914, 41 Fed.Reg. 17871 (April 28, 1976) assigns to HEW responsibility to set standards and guidelines for section 504. As a contemporaneous administrative interpretation of a statute this regulation is entitled to great weight. Udall v. Tallman, 380 U.S.1, 16 (1965); Rosado v. Wyman, 397 U.S. 397, 415 (1970).

39. Secretary Califano's statement when he signed the regulation was:

> The Section 504 Regulation attacks the discrimination, the demeaning practices and the prejudices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-

According to the HEW regulation, issued May 4, 1977:

> Section 504 was intended to forbid discrimination against all handicapped individuals. Section 504 ... represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap ... 42 Fed. Reg. 22676.

The regulation, under the title "Discriminatory actions prohibited," clearly states:

> A recipient, in providing any aid, benefit or service may not ...
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others ....

45 C.F.R. § 84.4(b)(1).

Under subpart E, regulating postsecondary

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sufficiency and decent treatment will begin to fall before the force of law ... In Section 504, the Congress enacted a charter of equality to help end the shameful national neglect of handicapped individuals and to translate many of their legitimate ends into legal rights....

education, this mandate is put forth even more clearly and specifically:

> Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

Id. §84.42(a).[40]

> "Qualified handicapped person" means...[W]ith respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity....

Id. §84.3(k)(3)

The College, far from disputing the validity of any of these regulatory provisions, merely contends that Ms. Davis fails

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40. Especially in light of the increasing types of employment opportunities with various degree requisites, discriminatory admissions policies are of major concern to disabled students applying to postsecondary institutions. See generally Leslie, Emerging Challenges to the Logic of Selective Admissions Procedures, 3 J. L. & Educ. 203 (1974).

to meet the regulation's definition of "qualified handicapped person" because of the very nature of her disability. However, it is clear from the regulation that the College, in assessing Ms. Davis' qualifications, must focus on her ability to meet petitioner's established standards. The College has failed to meet the dictates of the regulation in this regard.

In addition, the College ignores a further section of the post-secondary education subpart of the regulation that flatly says:

> Admissions. In administering admission policies, a recipient to which this subpart applies...may not make preadmission inquiry as to whether an applicant for admission is a handicapped person....

Id. § 84.42(b)(4) (emphasis provided). Reading these provisions of the regulation together, it is clear that in determining

whether a applicant is a "qualified handicapped person," a college may not consider the nature of the disability itself. It may, however, consider the ability of an applicant to safely and effectively meet the requirements of a particular program. In its analysis of these provisions of the regulation, "which describes the basis and purpose of [the] sections," 42 Fed. Reg. 22677, HEW underscores this point. An earlier, proposed version of the regulation had permitted such inquiries when used in nondiscriminatory manner.[41] However,

> Revised §84.42(b)(4) generally prohibits preadmission inquiries

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41.

The proposed version read:

> A recipient....may make pre-admission inquiry as to whether an applicant for admission is a handicapped person in order to comply with this part but may not use the results of the inquiry in a manner which results in discrimination on the basis of handicap.

41 Fed. Reg. 29566 (July 16, 1976).

as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of §84.14 on preemployment inquiries.

42 Fed. Reg. 22692 (May 4, 1977). The official analysis of section 84.14 states:

> The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job withqut endangering other employees.

42 Fed. Reg. 22689 (emphasis provided). HEW revised the pre-employment and pre-admission inquiry sections to provide for absolute prohibitions, save in the case

of remedial or affirmative action programs,[42] on the basis of its adoption of the position taken by handicapped persons that "such inquiries are

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42. This exception was incorporated in order to resolve policy conflicts arising from the fact that some schools may want to aid or favor disabled applicants--for example, in order to produce a more diverse student body, see Board of Regents v. Bakke, 98 S.Ct. at 2760 (Powell, J.), or to compensate for past discrimination, see, e.g. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) --while others should be blocked from obtaining information that will only set in operation explicit or unconscious biases. The regulation seeks to strike an appropriate balance by limiting pre-admission inquiries to those necessary for use in carrying out affirmative action programs and remedial obligations. 45 C.F.R. § 84.42(c)(1). Furthermore, to avoid discouraging applications, any educational institution making such inquiries must make clear that this information is sought on a totally voluntary basis, that it will be kept confidential, and that refusal to provide it will not subject the applicant to any adverse treatment. Id. § 84.42(c)(2). The regulation also allows inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation. Id. § 84.42 (b)(4).

often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests,"[43] and on the basis of its rejection of assertions by funding recipients, who had unsuccessfully argued that "inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping

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43. It has been judicially recognized that inquiries concerning an applicant's physical condition frequently result in exclusion of applicants from consideration without a determination as to their particular qualifications. Spencer v. Toussaint, 408 F.Supp. 1067, 1073 (E.D.Mich. 1976) (defendant's policy of conducting pre-employment inquiries not only hindered prospects of disabled persons for employment, but may have caused current employees to avoid seeking treatment in order to avoid becoming stigmatized). Similarly, various state civil rights statutes prohibiting discrimination on the basis of handicap have voided pre-employment inquiries. See, e.g., Milkosky v. American Smelting & Ref. Co., No.EV034B-8297 (N.J.Dep't Law & Pub. Safety, Feb. 15,1974). See also Cook, supra note 30, at 73-75.

condition, and accommodations that might be required."[44] Id.

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44. Non-disabled persons -- even some of the more sensitive ones -- often confuse this critical point. Thus, the question is heard frequently, in various forms: "What is the difference between asking if a person is disabled and asking if a person has abilities?" There is a difference, which section 504 recognizes. By pinning a label such as "crippled," or "retarded," or "blind," or "deaf," onto a person, a number of assumptions are triggered, some possibly based in fact, some perhaps not. See pages 35-41 supra. Far from "repeal[ing] all or any reasonable ... qualification standards," Pet. Bf. at 36, Congress has simply eliminated a procedure that is "often used to discriminate," yet not "necessary to determine qualifications [or] safety hazards." HEW, Analysis, supra. That such is the case may be seen upon careful consideration of the College's attempt at invoking the spectre of the blind bus driver, and its accompanying contention that the holding of the court of appeals would require such results. Pet. Bf. at 41. There are two ways a federally funded bus company could proceed in such a situation. The first would be to ask applicants whether they are blind. The second would be to ask applicants whether they have the ability to drive a bus (or to test for that ability). Obviously the result obtained is the same with both procedures, and there will be no blind bus drivers

Finally, "the single major factor," in the College's rejection of Ms. Davis, to wit "her projected inability to be licenced as a Registered Nurse after graduation," 424 F. Supp. at 1344, is also prohibitted by section 504. As the regulation makes clear, a college "may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity." 45 C.F.R. §84.43(c). The HEW analysis indicates the purpose of this provision:

> This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as assumptions by the recipient that no job

even though the first approach is impermissible. However, in other situations, such as that presented in this case, the results obtained would differ, as per the congressional purpose to expand opportunities for disabled persons by eliminating stereotypes associated with their disabilities.

> would be available in the area in question for a person with that handicap.

42 Fed. Reg. 22692. See also 45 C.F.R. §84.10(b).[45]

Nor can the College, as it attempts to do, Pet. Bf. at 42-45, hide behind various state regulatory statutes that possibly could be construed to require discrimination against handicapped persons. The HEW regulation states:

> The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

45. Persons can benefit from educational programs without ever engaging in fields for which that education "prepared" them. For example, graduates of law school often do not choose to practice law.

45 C.F.R. §84.10(a)[46]

Section 504, as the regulation construes it, mandates that the College change its policies and practices. It thus requires the result reached by the court of appeals.

2. The Legislative History of Section 504

The legislative history of section 504 also demonstrates the correctness of the decision of the Court below. This history encompasses two years, beginning with section 504's initial introduction in 1971 as an amendment to the Civil Rights Act of 1964, and culminating in its passage as part of the Rehabili-

46. If state or local laws and section 504 conflict, the supremacy clause dictates that section 504 take precedence. Thus, state and local laws cannot be utilized as defenses to section 504 actions. U.S.Const. art. VI, cl.2. See,e.g., Rosenfeld v. Soutnern Pac. Co., 444 F.2d 1219, 1226 (9th Cir. 1971) (state statute conflicting with title VII).

tation Act of 1973, after having been twice vetoed because of cost concerns.[47]

In construing a statute so as to give effect to the intent of Congress, the purpose of the legislation must be looked to as well as its words. United States v. American Trucking Association, 310 U.S. 534, 543-44 (1940). For where the purpose of Congress is clear "that purpose must be upheld." Hudson Distributors v. Eli Lilly and Co., 377 U.S.386,395 (1964). In discovering the purpose of Congress, the

47. Introduction, 118 Cong. Rec.S525 (Jan. 20,1972), 117 Cong. Rec. H45974 (Dec. 9, 1971); additional co-sponsors, 118 Cong. Rec. S9495 (March 22, 1972); the incorporation of section 504 into the Rehabilitation Act, 118 Cong. Rec. S32310 (September 26, 1972); 119 Cong. Rec.H1531 (March 8, 1973); passage of the Rehabilitation Act of 1973, unanimously. 1973 Cong. Quar. Alm. 557, et seq. The 1974 amendments to the Act, which amended the definition of handicapped individuals for purposes of section 504 and other provisions of title V, were also vetoed and Congress similarly overrode that veto with near unanimity, 39 to 7 in the House,90 to 1 in the Senate. S. Rep. No. 1297, supra page 33, at 1.

courts look to the early history of a statute, Territory of Hawaii v. Mankichi, 198 U.S. 197, 211 (1903), the evil a statute was designed to remedy, Rector of Holy Trinity Church v. United States, 143 U.S. 457, 463, 465 (1392), the spirit of the legislation, United States v. Guaranty Trust Co., 280 U.S. 478,485 (1930), and its legislative history, FTC v. Mandel Brothers, 359 U.S. 385, 388 (1959).

The evil section 504 was intended to overcome was squarely put by Senator Robert Dole:

> The primary goal of this bill is to assist handicapped individuals in achieving their full potential for participation in our society. . . . I believe this bill reaffirms the Senate's dedication to the handicapped citizens of this Nation. The handicapped represent a large minority group who have suffered a great many injustices. They face what seem to many, insurmountable barriers. As a minority, the handicapped have always known exclusion--exclusion from an adequate opportunity to develop and contribute to their fullest capacity. We must make available the best possible programs to each handicapped American and assure the assistance he or she requires to fulfill their potential.

119 Cong. Rec. 24589-90 (1973) (emphasis provided). Thus, it is clear that Congress had in mind the same remedy it enacted for other minorities subjected to discrimination, when it passed title VI. Senator Taft of Ohio voiced a similar theme, when he noted in floor debate that "too many (handicapped persons) are under-employed--utilized in capacities well below the levels of their training, education, and ability." Id. at 24587.

Similar statements made concerning the purposes of the Rehabilitation Act of 1972 (passed, but vetoed by President Nixon), which was practically identical to the statute which became law in 1973, confirm the legislative intent. Representative Reid noted the need, "no matter how severe their handicap," to evaluate disabled persons on the basis of "their individual aptitudes and abilities."

118 Cong. Rec. 8977 (1972). Representative Brademus, Chairman of the House Select Committee on Education, stated that the Congress was acting to ensure that all disabled people would be judged on the basis of "their particular abilities," and to ensure that "none of our disabled citizens need to stagnate in any poorly paid, unproductive work which is less than they could undertake." Id. at 8976-77. And Senator Randolph, Chairman of the Senate Subcommittee on The Rights of Handicapped Persons, duly noted the expected significant impact of Section 504, opening opportunities to disabled persons heretofore thought to be beyond their capacities:

> I want to say to the handicapped Americans who will benefit so greatly from this legislation, that a new day is dawning for many of you. The Congress has awakened to your needs. We do now, and will continue to do so in the future protect and expand your horizons, and with your help, bring a new dimension of dignity, hope, and self-sufficiency to all handicapped individuals.

Id. at 35840 (emphasis provided).

In the Rehabilitation Act Amendments of 1974[48] Congress redefined the term "handicapped individual" as used as section 504, in order to clarify the scope of section 504's coverage. 29 U.S.C. § 706(6). In so doing, Congress underscored its intention in section 504 to reach all of the "many forms of potential discrimination" against handicapped individuals, S. Rep. No. 1297, supra p. 33, at 38, and to protect each and every disabled person, in every program which receives federal financial assistance. The Senate Labor and Public Welfare Committee stated in its Report:

> Special attention must be paid to the needs of those individuals who through no fault of their own have not received adequate education. These individuals, young adults and asults alike, must be afforded equal opportunity and access to higher educational services. The Committee is aware that

48. These amendments have "cogent significance in construing Section 504." Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1285 (7th Cir. 1977), citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969).

> at the present time most of these avenues are not open to individuals with handicaps....

Id. at 6408 (emphasis provided). Adoption of the College's position would assure the construction of newer, more resilient roadblocks, by educational programs nationwide, in contravention of this congressional intent.

3. The Rehabilitation Act and Its Legislative History

Section 504 is an intrinsic portion of a comprehensive legislative scheme that constitutes a new charter for disabled people. Petitioner is correct that the Rehabilitation Act as a whole, and its legislative history, informs the meaning of section 504. Pet. Bf. at 30 . See Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-417 (1975); Burnet v. Harmel, 287 U.S. 103, 108 (1932); United States v. Katz, 272 U.S. 354, 357 (1926).

In revamping the federal rehabilitation program, Congress acted to purge historic sterotypes of disabled people, and the prejudice that arises from them, and to mandate that historic patterns of discrimination be reversed; services be extended to severely disabled people; and severely disabled people be included in all facets of the national life. In short, Congress enacted an integration imperative.

In the vocational service provisions of the Rehabilitation Act of 1973, Congress worked a profound change in the law governing rehabilitation, reversed more than fifty years' practice in vocational rehabilitation, and required that priority in vocational rehabilitation services to be given to "those with the most

severe handicaps."[49] 29 U.S.C. § 701(1). See note 17 supra. For decades vocational rehabilitation services had been directed to the mildly disabled, reflecting the judgment that severely disabled people were incapable of benefiting from services and training programs that include postsecondary education programs.[50] Thus, it is conclusively demonstrated that Congress had firmly in its consciousness the counter-stereotype fact

49. The definition of "severe handicap" in the Act includes "deafness." 29 U.S.C. §706 (12).

50. Sponsorship for higher education services has been a part of the vocational rehabilitation program since 1943. See note 17, supra. Indeed, federal sponsorship of higher education programs for deaf persons dates back to the founding of Gallaudet College in 1860, at the same time as the founding of the initial land grant colleges.

that severely disabled persons such as hearing impaired persons can successfully participate in training programs, such as postsecondary education programs, of all types.[51] Leaving no room for gainsaying, Congress mandated as the very purpose of the Rehabilitation Act to "authorize programs to. . . promote and expand employment opportunities in the public and private sectors for handicapped individuals...." 29 U.S.C. §701(8) (emphasis pro-

51. Senator Cranston, in floor debate, noted that an inherent goal of the legislators was "to ensure full services to handicapped individuals and to better enable this program to serve individuals with the most severe handicaps. . ." 119 Cong. Rec.24566 (1973) (emphasis provided). And, Senator Stafford stressed that "this legislation can guarantee that many more individuals with severe handicaps will receive more responsive services than at present." Id. at 24563 (emphasis provided).

vided). The Act further mandated that grants be utilized by state agencies, to "meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." Id § 720(a) (emphasis provided). A federal regulation enforcing the vocational service provisions of the Rehabilitation Act established standards for eligibility for vocational rehabilitation. "Employability" is defined by the federal regulation as

> a determination that the provision of vocational rehabilitation services is likely to enable an individual to enter or retain employment consistent with his capacities and abilities in the competitive labor market; the practice of a profession; . . .

45 C.F.R.§ 1361.1(g) (1975) (emphasis provided). See also id. §§ 1361.33(b), 1361.1(s), 1361.1(bb). The Federal Rehabilitation Services Administration Manual, which constitutes the official interpretation of the

statute and regulation,[52] further explains the philosophy of the overall program:

> Disabled individuals who are working substantially below their potential should be provided vocational rehabilitation services to help them engage in occupations more consistent with their capacities and abilities. Their potential, interests, and desires should be determined and then programs developed which will help them reach suitable employment goals.

Rehabilitation Services Administration, Program Regulation Guide No. 77-4, §1505.03 (b) (Jan. 19, 1977) (emphasis provided). See also id. No. 77.4, § 1505.03 (c) (Jan. 19,1977); No. 24-2-8, § IV (C) (June,1971). It is somewhat ironic to note that the various statutory provisions, regulations, guidelines and legislative history, clearly evince a Congressional purpose to guarantee that state rehabilitation agencies provide the type of educational program now being

52. See Florida Dept. of Health and Rehabilitation Services v. Califano, 449 F. Supp.274, 282 (N.D.Fla.1978).

denied to Ms. Davis by the petitioner. As Senator Stafford indicated on the floor of the Senate:

> Simply stated, the goal of this new law is to help handicapped individuals to achieve their full potential of participation within our society. The Senate-House Conference Committee, I think, has worked out a significant step forward in our vocational-rehabilitation programs that are well worthy of becoming law. . . . There are an estimated 7 to 12 million handicapped individuals in our Nation who have not realized their potential. . . .

118 Cong. Rec.35841 (1972) (emphasis provided). The Senate Committee on Labor and Public Welfare pointed to the similarities between the 1972 bill, and the Act passed in 1973:

> Inherent in the purpose of the prior legislation were changes designed to provide flexibility in the basis vocational rehabilitation program to ensure full services to handicapped individuals and to better enable this program to serve individuals with the most severe handicaps. Believing that it was necessary to emphasize that the final goal of all rehabilitation services was to improve in every possible respect the lives as well as the livelihood of individuals served, the Committee placed particular emphasis on

> developing a method of providing services which would be responsive to individuals needs. . . .

S. Rep. No. 318, 93d Cong., 1st sess., reprinted in 1973 U.S. Cong. & Ad.News 2076, 2078-79 (emphasis provided.)[53]

The 1978 amendments to the Rehabilitation Act further emphasize the need to enable handicapped persons to achieve full participation in life and society. They establish and fund a National Institute of Handicapped Research as well as public education programs highlighting ways of providing for the rehabilitation of handicapped persons. Pub. L. No. 95-602, §§ 107, 109(4), 92 Stat. 2962-65 (to be codified at 29 U.S.C. §§ 760, 761a)

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53. The sole court case interpreting the service delivery provisions of the Rehabilitation Act reads those provisions to require services based on individual needs, and casts in doubt administrative classifications and general resource allocations that tend to exclude handicapped persons from particular services. Scott v. Parham, 422 F. Supp. 111 (N.D.Ga.1976).

Nov. 6, 1978). These amendments expand the definition of "vocational rehabilitation services" to include as an inherent part of sponsorship for higher education and other training programs, the provision of recording materials for blind persons and, significantly, captioned films and video cassettes for deaf persons. Id. at § 104, 92 Stat. 2960, amending 29 U.S.C. § 723. In addition, training grants are provided for the expansion of reader services for blind persons and interpreter services for deaf persons. Id. at § 116, 92 Stat. 2975 (to be codified at 29 U.S.C. §§ 777c-e).

Senator Randolph, one of the co-sponsors of the 1978 amendments, explained on the floor of Congress that the legislature deemed it essential to provide these additional programs as "necessary support services" since "every severely handicapped person is

entitled to an opportunity to develop to the greatest extent possible." 124 Cong. Rec. S15548 (Sept. 20, 1978).[54]

54.

The Education Acts of 1974 and 1975, 20 U.S.C. §§ 1401, et seq., are premised in the same congressional finding about the competences of severely disabled people. Both Education Acts recognize individualization as a necessary condition of learning, growth and development by disabled people, e.g., 20 U.S.C. § 1421(4), place a priority on service to children with the most severe handicaps, e.g.,20 U.S.C. §1412(e); 121 Cong. Rec. S10961; 121 Cong. Rec. H11353, and both state their own integration requirement, based upon the same findings and with similar purposes as section 504's integration imperative: that, to the maximum extent appropriate, handicapped children, including children who are in public or private institutions or other care facilities, [shall be] educated with children who are not handicapped.... 20 U.S.C. § 1412(5). For the purposes of primary and secondary education programs, at least, these two statutes and section 504 are to be read together. Kruse v. Campbell, 431 F.Supp. 180, 185-86 (E.D. Va.) (three-judge court) vacated and remanded for decision on section 504, rather than constitutional

In addition, the same Congress that initially adopted section 504, in section 501 and 503 of title V of the Rehabilitation Act of 1973 required that executive agencies of the federal government and government contractors,[55]

grounds, 98 S.Ct. 38 (1977). See also HEW 504 Regulation, Analysis, 42 Fed. Reg. 22690 (May 4, 1977).

The Congressional purpose to pierce the stereotype that severly disabled children cannot be integrated into normalized settings is evident throughout the legislative history. See 121 Cong. Rec. S10960 (remarks of Sen. Randolph); id. at S10961 (remarks of Sen. Strafford); id. at S10981 (remarks of Sens. Cranston & Mondale); id. at S10977 (remarks of Sen. Dole); id. at H 11350 (remarks of Rep. Michel); id. at H11351 (remarks of Rep. Daniels). See also The Realization of the Least Restrictive Educational Environments for Severely Handicapped Students, 2 The American Association for the Education of the Severely and Profoundly Handicapped Review 195-201 (1977).

55.

Section 503, 29 U.S.C. §793, closely follows Executive Order No. 11246, 3 C.F.R. 173, 42 U.S.C. §2000e-z (notes) and its

respectively, take affirmative action to employ disabled people, including severely disabled people. 29 U.S.C. §§ 791, 793. These provisions prohibit employers from denying jobs to disabled persons because of the same types of stereotyped assumptions that are at the root of petitioner's exclusionary policy.

The Rehabilitation Act and its legislative history confirm that the Congress intended section 504 to charter a new status for disabled people and affirmatively to require that disabled people, especially severely dis-

predecessors requiring affirmative action to achieve nondiscrimination by federal contractors on grounds of race. See, e.g., Contractors Assn. v. Secretary of Labor, 311 F.Supp. 1002, 1009 (E.D.Pa. 1970), aff'd, 442 F.2d 159 (3d Cir. 1971).

abled people, be included in every aspect of national life. This purpose was best articulated by the Congress itself in the White House Conference on Handicapped Individuals Act, section 301(6), enacted December 7, 1974:

> The Congress find that...it is essential that recommendations be made to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working and service patterns to be held as the final objective.

29 U.S.C. § 701 note.

4. The Cases Enforcing Section 504

Since 1973, the federal courts have construed and enforced section 504 to the same effect as the Court of Appeals below.

The first judicial construction of section 504 was Gurmankin v. Costanzo,

411 F. Supp. 982 (E.D. Pa. 1976), in which the plaintiff challenged a school district policy of exclusion of visually handicapped individuals. Id.at 983, 985. Even though it was conceded that Ms. Gurmankan had "all the academic qualifications and requisites for teaching," the defendants refused her a position because of their "concern with her ability to operate in emergency situations requiring sight and agility." Id at 987. The Court made findings of fact that the evaluation of Ms. Gurmankin "was based, at least in part, on misconceptions and stereotypes about the blind and on assumptions that the blind simply cannot perform";that "unequal treatment accorded the blind is the result of misconceptions and myths held by sighted persons about the blind"; that the "examiners for Ms. Gurmankin ... had had no prior contact with blind teachers or blind applicants for teaching positions," nor "did they undertake any special preparations to become better

informed of the problems, or capabilities of blind teachers"; and that "[s]ighted persons may make erroneous assumptions of the abilities of blind persons." Id. at 985-87. Based on these findings, the court rejected the defense based upon safety concerns, found it "clear that a refusal to hire a blind person as a teacher is the kind of discrimination which [Section 504] was meant to prohibit," and ordered the hiring of Ms. Gurmankin. Id. at 989. A unanimous court of appeals affirmed this decision. 556 F.2d 184 (3d Cir. 1977).[56]

Duran v. City of Tampa is to the same effect. There, an applicant for a police officer opening was denied employment because of safety concerns arising from his history of epileptic seizures. On a motion for a

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56. Reaching the constitution, the court of appeals held that the district policy created a "presumption that blind persons could not be competent teachers, in violation of due process." 556 F.2d at 187.

preliminary injunction, the court indicated that the city's actions, based, as in Ms. Davis' case, solely upon a record of a physical examination, constituted discrimination under section 504. 430 F. Supp. 75, 78 (M.D. Fla. 1977). Following a trial, the court issued an order in which the city was "directed not to consider" the applicant's disability "as a disqualifying medical condition." 451 F. Supp. 954, 955 (M.D. Fla. 1978).

In another employment case, Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978), rehabilitated drug addicts were denied jobs because of their medical conditions. The court ordered the employer to evaluate the abilities of the applicants without regard to their disabilities, and, with a cite to the pre-employment inquiry prohibition of the HEW regulation, stated that the employer had "denied them the benefits of a program receiving federal financial assistance ... in direct violation of the Act." Id. at

796-97.

The section 504 employment cases[57] thus make clear that courts will not rubber stamp conclusory assertions regarding

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57. See also Drennan v. Phila. Gen. Hosp., 428 F. Supp. 809, 814-14 (E.D. Pa. 1977) (applicant denied employment as a nurse-anesthetist stated a valid cause of action under sections 503 and 504); Whitaker v. Bd. of Higher Educ., 461 F. Supp. 99, 106-09 (E.D. N.Y. 1978) (college's denial of tenure to professor on basis of disability stated valid cause of action under section 504).

Cases decided under various state non-discrimination statutes are to the same effect. In Boynton Cab Co. v. Dep't of Ind., Labor & Human Relations, 18 E.P.D. ¶ 8819 (1978), the Wisconsin Court of Appeals affirmed an agency determination that the cab company discriminated in its refusal to hire, for reasons of safety, an applicant who had had one of his arms amputated. The court noted that the company should have focused upon the applicant's ability to safely drive a car, rather than drawing conclusions from the nature of his disability.

In Connecticut Institute for the Blind v. Comm'n. on Human Rights, 18 E.P.D. ¶ 8815 (1978), a unanimous Connecticut Supreme Court reversed an agency determination that a visually disabled person could not safely supervise young children with their own severe multiple disabilities. The court noted that the employer's exclusion "without examination of individual capabilities," and "without any effort to define the specifications of the position of teacher's aide or to test the capacities of the complainant for that position, cannot stand."

Similarly, in Fraser Shipyards v. Dep't of Ind., Labor, & Human Relations, 13 F.E.P.

the inability of disabled persons to safely and effectively perform in a wide range of educational programs and activities.[58]

Cases 1809 (1976), the court found discriminatory a refusal to hire diabetics as welders. The employer's contention that because some diabetics might present a hazard to other employees, all diabetics could be disqualified from potential employment as welders in that industry, was held to be "precisely the type of rationale that the Wisconsin Fair Employment Law is designed to overcome."

58. The College's reliance on the ADEA bfoq cases in this regard is misplaced. See Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976), both cited in Pet. Bf. at 46. First, the rationale of Greyhound and Tamiami has been seriously undermined by later cases, all of which have demanded strict proof of causal relationships between age and inability to safely perform job-related tasks, in a wide variety of jobs. See, e.g., Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.) (Clark, Cir. J.), cert. denied, 434 U.S. 966 (1977) (test pilots); Rodriguez v. Taylor, 428 F. Supp. 1118 (E.D. Pa. (1976) (police officers). Second, even if the Court were inclined to follow Greyhound and Tamiami, those cases are distinguishable, in that their respective trial courts received massive quantities of evidence indicating both mental and psychological changes inherent with aging precluded safe performanance of particularized essential job tasks,

In terms, specifically, of educational programs and activities, the discriminatory exclusion of disabled students in the course of initial admissions procedures also has been judicially recognized, albeit in the context of primary and secondary, rather than post-secondary education, as a violation of section 504. In Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va, 1976), the plaintiff child, Trina Evet Hairston, "was not wanted in the regular classroom," Id. at 182, because of her spina bifida condition. The

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and that individual testing of all applicants over forty was not possible. In terms of specific proof, even those courts demanded that "the safety factor...be evaluated in terms of the possibility or likelihood" of someone being injured. 531 F. 2d at 237. Contrast the case before the Court, in which the College has failed to identify essential abilities necessary to participate safely in its educational program, failed to test Ms. Davis' abilities to so participate, and failed to consider the impact of the provision of academic adjustments, or auxiliary aids, on those abilities, as required by the HEW regulation.

court determined, as a finding of fact, that:

> The needless exclusion of students who are able to function adequately from the regular classroom situation would be a great disservice to these children. A child's chance in this society is through the educational process... This conclusion is further enforced by the critical importance of education in this society.

Id. at 182.[59] Based upon this determination,

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59. This language is reminiscent of that used by this Court in Brown v. Board of Education, 347 U.S. 483, 494 (1954), when it determined that the exclusion of blacks from educational programs involving "others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The mandate for integration of disabled students in higher education programs clearly is based on the premises accepted by the Court in Brown. Indeed, many of the cases that paved the way for Brown dealt with higher education. Four years before the Brown opinion, the Court, in Sweatt v. Painter, 339 U.S. 629 (1950), began speaking about educational opportunity in relation to race discrimination in post-secondary institutions. The case was brought by a black student excluded from the University of Texas Law School. The Court ordered that the student be admitted. To deny the student the right to attend would have robbed him of the opportunity to participate in the educational experience on par with white students. Id. at 634. See also McLaurin v. Oklahoma Board of Regents, 339 U.S. 637 (1950); Sipuel v. University of

the court held that the exclusion from the school based upon a stereotyped conception of the abilities of a person with spina bifida was a violation of section 504 and concluded that

> To deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of benefits of such program in violation of the statute.

Id. at 184[60]

The guarantee of equal educational opportunities under section 504 and the need for safety in the classroom recently collided in the context of the on-going litigation involving the rights of mentally retarded

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Oklahoma, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

60. Accord, Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978); Howard S. v. Friendswood Indep. School Dist., No. G78092 (S.D. Tex. 1978, June 23, 1978); Rhode Island Society for Autistic Children v. Board of Regents, No. 5081 (D.R.I., Aug. 1, 1975). See also Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

children institutionalized at the Willowbrook Developmental Center in Staten Island, New York. The state had entered into a consent judgment in which the children were to be placed in more normalized settings, which included attending school with non-handicapped children. See New York State Association for Retarded Children v. Carey, 357 F.Supp.752 (E.D.N.Y.1973) (findings); 393 F.Supp.715 (E.D.N.Y.1975)(order). When it was discovered that several of the retarded children had acquired the disease Hepatitus B while residing at the institution, the New York City Board of Education decided to exclude these children from the public schools because of the possibility of contagion. New York State Association for Retarded Children v. Carey,Nos. 72-C-356-57 (E.D.N.Y., Sept. 14, 1978), at 1-3. Despite the testimony of medical doctors to the effect

that there was some real risk of contagion, the court held that section 504 requires that the handicapped children be admitted to the integrated program where

> the risk . . . is not substantial enough to justify their discriminatory exclusion from public school. The risk of contagion cannot be ignored, but their are prophylactic measures . . . which can be taken in order to reduce the risks to a de minimus level. It is not necessary to close the schoolhouse door to these children.

Id. at 17.

In response to this holding the Board of Education formulated a new plan, this time segregating the affected children within the public schools, arguing that the risk of contagious contacts was enhanced by the maladaptive behavior of the retarded children. Concluding that the Board "once again overreacted," the court indicated that section 504 required individual determinations "that each of the 48 carriers actually engages in such contacts or ... any other of the constel-

lation of factors involved in the transmission of Hepatitis B ..." New York State Association for Retarded Children v. Carey, Nos. 72-V-356-57 (E.D.N.Y., Feb. 28, 1979). Thus, on the court's construction the Board of Education failed to show that the students could not safely participate in the integrated classroom setting.

As with the petitioner in this case, the fatal error of the Board of Education was its failure to make any individualized determinations with regard to the amount of safety deemed requisite and the inability of the disabled student to meet that standard. The Board of Education "overreacted" to an unjustified fear of harm to other students just as the college based its decision on a sterotyped conception of the abilities of hearing impaired person.

Thus, the education cases also demonstrate that the consistent judicial construction of section 504 is congruent with that of the court of appeals below. Decisions such as the one denying admission to Ms. Davis are often unconsciously made because of sterotyped assumptions about the capabilities of disabled persons. Similarly, the district court below fell "into the trap of assuming that the Act permits ancient canards about the proper role" of disabled persons to be a basis for discrimination. Phillips v. Marietta Corp., 400 U.S. 542, 545 (1975) (Marshall, J., concurring). Before section 504 was passed, a college could fashion its admissions criteria "on the basis of assumptions about the differences" of disabled persons, "whether or not the assumptions were valid. [But i]t is now well recognized that....decisions cannot be predicated on mere stereotyped

impressions about the characteristics" of disabled persons. Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702,707 (1978)[61]

The College has failed to meet even its most minimal burden of identifying essential abilities necessary for participation in the nursing program. Certainly concerns about hazards to Ms. Davis herself, Pet. Bf. at 45, "do not touch upon the essence" of the education program. Burwell v. Eastern Airlines,

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61. Federal courts have consistently struck down classifications based upon sterotyped assumptions regarding the capacity of women to perform, in the context both of admissions policies of educational institutions, Berkelman v. San Francisco Unified School Dist., 501 F. 2d 1264 (9th Cir. 1974) (different admissions standards for females violate title IX); Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) (different admissions standards utilized because of assumptions about suitable and proper fields for women); and hiring practices of employers, Gillin v. Federal Paper Bd. Co., 479 F.2d 97, 102 (2d Cir. 1973); Jurinto v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044 (3d Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 717 (7th Cir. 1969); Vogel v.

18 E.P.D. ¶ 8759, at 5082 (N.D.Va. 1978). As this Court held in Dothard v. Rawlinson, 433 U.S.321, (1977), "the argument that a particular job is too dangerous" is rebutted by the purpose of section 504 "to allow the individual to make that choice for herself."[62]

Further, the College, at trial, failed to show that Ms. Davis could not safely and effectively perform the

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TWA, 346 F. Supp. 805, 819 (W.D. Mo. 1971); Cheatwood v. South Central Bell Tel.& Tel. Co., 303 Supp. 754, 758-59 (M.D. Ala. 1969).

62. This principle has been recognized in the disability discrimination context. See Borden v. Rohr, No. C2-75-844 (S.D.Ohio, Dec. 30, 1975) (ordering college to permit the playing of contact sports by a student blind in one eye); Chicago, St.Paul & Pacific R.R. Co. v. Wisconsin Dept. of Ind., Labor & Human Relations, 4 E.P.D.¶ 7573 (1971), modified on other grounds, 62 Wis. 2d 392, 215 N.W. 2d 443 (1974) (refusing to allow employer to dismiss asthmatic worker on basis that fumes in work area endangered employee's health). See also Kampmeir v. Nyquist, 553 F.2d 296, 300 n. 9 (2d Cir. 1977).

essential functions of the nurse training program. First, the College never delineated a list of essential functions, but instead indulged in a recitation of job situations, such as very narrow operating room procedures, which might be altered or safely performed with the use of auxiliary aids. Second, it never considered the possibility of adapting these functions. Third, it never considered the impact of the use of auxiliary aids in enabling Ms. Davis to perform these functions. Fourth, even assuming that the College is correct--and it is not--in presuming that Ms. Davis could not perform in certain registered nurse positions, the College never showed that the same essential functions are required to safely and effectively perform in the nurse training program. Fifth, the College never considered the possibility of modifying course requirements as a function of the requirement of academic adjustment.

Sixth, the College never considered the impact of the use of auxiliary aids in enabling Ms. Davis to safely and effectively complete the educational program. Finally, the College officials produced no evidence correlating any required abilities "with the requisite amount of safety thought essential." Dothard v. Rawlinson, 433 U.S. at 331.[63] Thus, it is clearly required that the College

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63. The College now attempts to assert in its argument that the requirements for a student are coextensive with those of a registered nurse. Pet. Bf. at 34. Furthermore, it attempts to construct new situations in which Ms. Davis might not be able to perform, Pet. Bf. at 44. There is no basis for these contentions in the record, and "a reviewing court is not ordinarily justified in relying on arguments in favor of a ... qualification that were not presented to the trial court." Dothard v. Rawlinson, 433 U.S. at 340. (Rehnquist, J., concurring).

In addition, the College's reliance, as persuasive authority, upon a 1962 nursing textbook, Pet. Bf. at 45-46, is at best, questionable. Even if what is thought to be good practice has not changed somewhat in seventeen years, it is well-settled that

identify specific requisite abilities essential to its educational programs. The College has failed to meet this requirement. Further, this Court has consistently held that once those abilities are specified, a further requirement of the College is that:

> (its) purpose...be achieved by adopting and validating a test for applicants that measures (those abilities) directly. Such a test would fully satisfy the standards of the statute because it would be one that "measure(s) the person for the job and not the person in the abstract"...But nothing in the present record even approaches such a measurement.

Id. at 332, quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (Burger, Ch.J.). If petitioner, and other colleges across the country, are permitted to indulge in traditional assumptions about the abilities of disabled persons and are not put to the test of proving that these assumptions are justified

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usual practices of others in a profession cannot itself justify discriminatory practices. See, e.g., Robinson v. Lorillard Corp., 444 F.2d 791, 799-800 (4th Cir.), cert. denied, 404 U.S. 1006 (1971)

by the facts, section 504 will have virtually no impact on discrimination. As with title VI, however, Congress required individualized, factual based determinations. "In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs" on the basis of their disabilities. Regents v. Bakke, 98 S. Ct. at 2814 (Stevens,J.). See also id. at 2761 (Powell, J.) ("Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.").

Section 504 makes it unlawful to discriminate against any handicapped individual. As this Court noted in Los Angeles Department of Water and Power v. Manhart, 435 U.S. at 708, 709 (1978),

> The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A "stereotyped" answer to that question may not be the same as the answer which the language and purpose of the statute command....The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a...class ...Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply... . Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices which classify . . . tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.

This requisite "thoughtful scrutiny" surely was not given Ms. Davis. Indeed the decision of the College was grounded instead upon "their feelings," 424 F.Supp. at 1343, ¶9, that she would be unable to perform, based upon their reading of a bare medical record.[64] The College can-

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64. Amicus Equal Employment Advisory Council seriously distorts the record when it states in its brief, at 16-17 n.11, that the

not be permitted to substitute justification and rationalization for specific factual determination of Ms. Davis' inability[65] to participate in its program.

"college...gave Ms. Davis an individual examination to determine the probable impact of her hearing disability on her ability to function as a student nurse and, ultimately, as a registered nurse." It must be pointed out that the audiologist who performed the examination made no recommendation with regard to Ms. Davis' ability to participate in the nursing program. The College personnel based "their feeling" solely on the report itself, without any analysis of Ms. Davis' abilities. Nor can "their feeling" be looked upon as "the probable impact." Nor did "their feeling" pertain to the student program, but only to employment as a registered nurse.

65. This principle, specifically with regard to disabled persons, finds constitutional support. The twenty-fifth amendment concerns the removal of a handicapped President from office. If it should arise that a handicapped President "transmit... his written declaration that no inability exists," then the cabinet officers and, ultimately, Congress must decide whether "the President is unable to discharge the powers and duties of his office...." U.S. Const. amend. XXV, § 4 (emphasis added). Thus, if such a strict standard is imposed on the Congress for the removal of a handicapped President, responsible for the safety of 200 million Americans, not to mention our allies overseas, Southeastern Community College can be required to do no less.

Although "[p]rocedure by presumption is always cheaper and easier than individualized determination," Stanley v. Illinois, 405 U.S. 645, 656 (1972), section 504 forbids generalizations, even those based upon otherwise accurate medical reports. The College certainly may reason its admissions decisions on concerns of ability to safely perform; here, however, petitioner's procedure is invalid because of its "discriminatory application of such a reason." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).[66]

Assumptions about the influence of a

66. Under the McDonnell Douglas test, the College has not even met its initial burden of rebutting the presumption that Ms. Davis disability itself played the determining role in its decision to refuse her admission. 411 U.S. at 802-805. However assuming that it successfully did put forth a discriminatory reason for its decision, that reason certainly was "discriminatory [in its] application." Id. at 806.

disability on a person's ability to perform are at the core of discrimination based upon disability. See pages 35-40 supra. College admissions criteria must evaluate the actual abilities of disabled persons without superimposing stereotyped conceptions of those abilities. Otherwise, admissions criteria will create "build-in headwinds" for disabled applicants. Griggs v. Duke Power Co., 401 U.S. at 432. The only way to change these attitudes toward disabled persons is through direct contact. Such contact will occur only if section 504 is enforced in such a way as to compel colleges to adopt practices that ignore the sterotyped images of disabled persons.

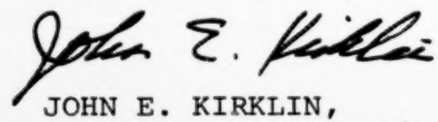
Thus the decisions of this court, when read together with the consistent construction of section 504 by the lower federal courts, lead to the inescapable

conclusion that the holding of the court below was correct.

CONCLUSION

The decision of the court of appeals should be affirmed, and the cause remanded to the district court for a determination of respondent's ability to safely and effectively participate in petitioner's educational program.

Respectfully submitted,



KALMAN FINKEL
Attorney-in-Charge
THE LEGAL AID SOCIETY OF NEW YORK CITY
CIVIL DIVISION

JOHN E. KIRKLIN,
Director of Litigation
TIMOTHY M. COOK, Of Counsel
THE LEGAL AID SOCIETY
OF NEW YORK CITY
CIVIL APPEALS & LAW REFORM UNIT
11 PARK PLACE, 8th FLOOR
NEW YORK, NEW YORK 10007

(212) 227-2755

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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

vs.

FRANCES B. DAVIS,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Brief of the California Association for the Physically Handicapped, California Epilepsy Society, Epilepsy Society of San Diego, Los Angeles County Epilepsy Society, California Paralyzed Veterans of America, California Association for Physically Handicapped Service Center, Center for Living Independently in Pasadena, Inc., Community Resources for Independence, Community Service Center for the Disabled, Inc., Contra Costa County Independent Living Center, Dayle McIntosh Center for the Disabled, Disabled Resources Center, Inc., Independent Living Center, Inc., Resources for Independently Living, Inc., Rolling Start, Inc., San Francisco Independent Living Project, Westside Community for Independent Living, Inc., Disability Law Center, Disabled Students Coalition, Los Angeles Council for the Handicapped, National Federation of the Blind of California, National Tuberous Sclerosis Association, Southern California Chapter of the National Multiple Sclerosis Society, United Cerebral Palsy-Spastic Childrens Foundation of Los Angeles County, Western Law Center for the Handicapped, as Amici Curiae.

MARILYN HOLLE,
WESTERN LAW CENTER FOR THE HANDICAPPED,
849 South Broadway, Suite 1201,
Los Angeles, Calif. 90014,
(213) 972-0061,

STANLEY FLEISHMAN,
FLEISHMAN, BROWN, WESTON & ROHDE,
433 North Camden Drive, Suite 900,
Beverly Hills, Calif. 90210,
(213) 550-7460,

Counsel for Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Interest of Amici.

Section 504 of the Rehabilitation Act—the Civil Rights Act for handicapped persons—has been trumpeted as one of the most important pieces of legislation in our history. Its goal was to open a new world of equal opportunity for more than 35 million handicapped persons—the blind, the deaf, persons confined

to wheelchairs, the mentally ill or retarded, and those with other handicaps.

Amici have a vital stake in seeing that the fundamental principle embodied in §504—that handicapped persons are to be treated equally, and as equals—is realized.

The California Association of the Physically Handicapped represents and advocates the interests of its over 4,000 disabled members.

The California Epilepsy Society, the Epilepsy Society of San Diego, and the Los Angeles County Epilepsy Society assist people with epilepsy in the areas of employment, driving, counseling, and discrimination. These amici have 5,000 members.

California Paralyzed Veterans of America provides services and advocacy to protect the interests of disabled veterans.

California Association for Physically Handicapped Service Center in Fresno, Center for Living Independently in Pasadena, Inc., Community Resources for Independence in Santa Rosa, Community Service Center for the Disabled, Inc., in San Diego, Contra Costa County Independent Living Center, Dayle McIntosh Center for the Disabled in Garden Grove, Disabled Resources Center, Inc., in Long Beach, Independent Living Center, Inc., in Van Nuys, Resources for Independently Living, Inc., in Sacramento, Rolling Start, Inc., in San Bernardino, San Francisco Independent Living Center, and the Westside Community for Independent Living, Inc., in Los Angeles are all organizations of disabled persons providing direct services to the disabled so that they m ght live independently, as full citizens, in their own communities. Such services include transportation, independent living skills, financial counseling and attendant care. Combined, they serve over 10,000 disabled people per year and cover a service area which includes over 500,000 disabled persons.

The Disability Law Center provides free legal services to the physically disabled in Santa Clara County.

The Disabled Students' Coalition is a coalition of disabled students in post-secondary education at the more than 100 community colleges, 9 University of California campuses, 19 State University and College campuses, and 225 private post-secondary educational institutions in California.

The Los Angeles Council for the Handicapped is an arm of the city government which serves the special needs of the disabled.

The National Federation of the Blind of California promotes the interests of the blind by expanding education and employment opportunities.

The National Tuberous Sclerosis Association promotes basic and genetic research concerning the enigmas of tuberous sclerosis.

The Southern California Chapter of the National Multiple Sclerosis Society provides counseling and advocacy services for the approximately 4,000 persons in Los Angeles County with multiple sclerosis.

United Cerebral Palsy/Spastic Childrens Foundation of Los Angeles County provides services to people with cerebral palsy and associated developmental disabilities.

The Western Law Center for the Handicapped is a public interest law firm concerned exclusively with protecting the legal rights of people with disabilities.

For the reasons set forth in their brief, amici respectfully urge the court to affirm the judgment of the court below.

I

A State Community College, Receiving Federal Financial Assistance, Has a Duty Under §504 of the Rehabilitation Act and Its Implementing Regulations to Make Such Modifications to Its Academic Requirements as Are Necessary to Insure That Such Requirements Do Not Discriminate, or Have the Effect of Discriminating, on the Basis of Handicap, Against a Qualified Handicapped Applicant.

The Southeastern Community College ("College"), a public educational institution, receiving federal financial assistance, denied Frances B. Davis, a licensed practical nurse, admittance to the College's Associate Degree Nursing Program ("Program") because of her hearing disability. The district court held that although Ms. Davis was plainly a "handicapped individual" within the meaning of 29 U.S.C. §706(6), the College did not discriminate against her in violation of §504 of the Rehabilitation Act (29 U.S.C. §794). At the time the district court made its decision, the Secretary of Health, Education and Welfare ("HEW") had not yet promulgated his regulation implementing §504. That regulation became effective approximately six months after the district court's decision. The Court of Appeals in a "rather narrow" holding, vacated the judgment of the district court and remanded the case to give the College the opportunity to reconsider Ms. Davis' application for admission to the nursing program in light of the HEW regulations.

The Court of Appeals concluded that the district court gave a too grudging reading to the statutory language "otherwise qualified" found in §504, particularly in light of the interpretation of those words in the HEW regulation.

The Court of Appeals disagreed with the conclusion of the district court that Ms. Davis was not "qualified" to participate in the nursing program and pursue her chosen profession as registered nurse. In response to the district court's contention that Ms. Davis was not qualified because in certain situations, such as in an operating room environment where surgical masks are used, her ability to read lips would be unavailable to her, the Court said:

> "Be that as it may, in the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly the plaintiff could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities. If the plaintiff meets all the other criteria for admission in the pursuit of her RN career . . . it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." 574 F.2d at 1161, n.6.

The core question presented in this case in whether §504 should be given a broad, liberal interpretation or a narrow, grudging one. Petitioner argues that the Fourth Circuit's reading of §504, while "perhaps more literal" than the reading given it by the district court, is erroneous. According to petitioner, the Court of

Appeals mistakenly "relied upon a selective and questionable reading of certain HEW regulations and explanations of the statutory words, which had been released some time after the district court's decision." (Brief for Petitioner p. 24.)

Initially, it should be remembered that we deal with a civil rights statute designed to remedy long lasting and deep discrimination against a powerless minority. The interpretation of §504 must therefore be made in light of this Court's repeated declaration that Civil Rights Acts should be accorded a sweep as broad as their language permits. *Griffin v. Breckenridge,* 403 U.S. 88, 98 (1971); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968); *United States v. Price,* 383 U.S. 787, 801 (1966).

Additionally, the weight to be given the HEW regulation is great, since Congress and the President called upon HEW to coordinate government-wide enforcement of §504. In *Cherry v. Matthews,* 419 F.Supp. 522 (D.C. D.C. 1976), the court, after reviewing the legislative history of §504,[1] concluded that the Secretary of HEW "is required to promulgate regulations effectuating §504." Executive Order No. 11941, 41 F.R. 17871 (April 29, 1976), made HEW primarily responsible for implementing and coordinating enforcement of §504. In response to this Executive Order, Secretary Califano issued a second regulation on January 13, 1978 dealing with §504, coordinating all government-wide enforcement of that statute. 43 Fed. Reg. 2132.

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[1]*See* S.Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974); H.R.Rep. No. 32-1457, 93d Cong., 2d Sess. 27-28 (1974); S. Rep. No. 32-1297, 93d Cong., 2d Sess. 39-40 (1974).

Amici now turn to the HEW regulations which petitioner asks this Court to undermine.

A.

In remanding the case to the district court for further proceedings, the Court of Appeals suggested that the district court give "close attention" to respondent's claim for some sort of "affirmative relief" under §504 and the relevant HEW regulations—particularly those dealing with modifying the academic requirements of an educational program and providing auxiliary aids to students with impaired sensory skills.[2]

The initial HEW regulation is divided into seven parts, subpart (E) dealing with post-secondary education. It proscribes discrimination against handicapped persons in admission, and states: "Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to insure that they are not effectively excluded from programs because of the absence of auxiliary aids." 42 Fed.Reg. 22676, 22677. The Court of Appeals pointed to a number of sections in the regulation implementing this broad policy statement. 45 C.F.R. §84.44(a); §84.44(d)(1); §84.43(c); and §84.12(a). Those sections call upon a college or university to make such modifications to its academic requirements as are necessary to insure that they do not discriminate, or have the effect of discriminating on the basis of handicap, against a qualified handicapped applicant or student. The modifications called

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[2]S.Rep. No. 32-1297, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S. Code Cong. & Adm. News at 6390, states: "Where applicable, §504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination."

for may include changes in the specific courses required and adaptation of the manner in which specific courses are conducted. Petitioner does not deny that it could make the necessary adjustments to enable Ms. Davis to satisfactorily complete the nursing program. The position of the College, as the Court of Appeals stated was clear—"It was not prepared, from a faculty viewpoint, to adequately supervise and train the plaintiff during her clinical training. Therefore, it could not modify its program to compensate for plaintiff's hearing disability." 574 F.2d at 1162. The Court of Appeals remanded the case to the district court to consider whether the College "could be required to modify the nursing program so as to accommodate the plaintiff and her hearing disability." *Ibid.*

B.

Petitioner's basic contention is that it can exclude Ms. Davis from its program if it concludes that she would not be "*fully* qualified in *all* respects." (Petitioner's Brief p. 24, emphasis added.) As already noted, the Court of Appeals, relying on the HEW regulation, was of the view that Ms. Davis' hearing disability would not disqualify her from participating in the nursing program or from working as an RN if there are "a number of settings in which [Ms. Davis] could perform satisfactorily as an RN, such as in industry or perhaps a physician's office." 574 F.2d at 1161, n.6.

Contrary to the impression petitioner seeks to give, this case does not involve an application by Ms. Davis for employment as a nurse in an operating room. Rather, she seeks to upgrade herself, to move from a licensed practical nurse, performing certain nursing

functions, to a registered nurse, a professional. Petitioner argues that Ms. Davis must be denied this opportunity because to go through the program, "she must continue to use her hearing aid and she must continue to read lips for effective communication." Worse, according to the petitioner, Ms. Davis "is now apparently seeking additional kinds of special training, as well as individual supervision in her projected RN rounds." (Petitioner's Brief p. 46.)

Amici respectfully submit that petitioner's argument that Ms. Davis must be denied the opportunity of proving that she can work as a registered nurse, effectively, if unconsciously, reduces Ms. Davis' chance to live a dignified life as a first class citizen. Timothy M. Cook, a lawyer and a disabled individual, discusses the subtle pressures society imposes on handicapped persons to play the role of "cripple", in his article "Blind Discrimination in Employment Under Rehabilitation Act of 1973," 27 The American University Law Review 31 (1977):

> "I learned that the cripple must be careful to not act differently from what people expect him to do. Above all they expect a cripple to be inferior to themselves, and they will become suspicious and insecure if the cripple falls short of these expectations. It is rather strange, that the cripple has to play the part of the cripple, just as women have to be what the men expect them to be, just women; and that Negroes often have to act like clowns in front of the 'superior' white race, so that the white man shall not be frightened by his black brother."

According to petitioner's argument all colleges and universities receiving federal financial assistance may exclude all deaf and blind persons from the medical and nursing professions and virtually all other professions. It is true that the district court stated that under §504, "it would most probably be impermissible to exclude a blind or deaf person from admission to law school, if academically qualified" (424 F.Supp. at 1345) and petitioner apparently takes the same view. (Petitioner's Brief pp. 29, 38.) Amici respectfully submit, however, that if, as petitioner contends, a professional must be "*fully* qualified in *all* respects" a deaf or blind prospective lawyer would not pass petitioner's test.

Petitioner finds its guiding principle in *Bradwell v. The State,* 83 U.S. (16 Wall.) 130 (1872) where the Court concluded that women constitutionally could be denied the right to practice law. Referring to the Court's conclusion as "outmoded and unfortunate" petitioner nevertheless asserts that Mr. Justice Bradley uttered a truism when he wrote:

> "In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence." (Petitioner's Brief pp. 29-30.)

The difficulty with a "truism" is, as history repeatedly teaches, that it is often not true. In *Muller v. Oregon,* 208 U.S. 412 (1908) the Court dealt with an Oregon statute which provided that no woman could work

in certain establishments for more than ten hours a day. In upholding the validity of the statute against constitutional attack, the Court asserted that states have power to establish legislation designed to safeguard the health of women because "healthy mothers are essential to vigorous offspring. . . ." 208 U.S. at 421. In *Miller v. Wilson,* 236 U.S. 373 (1915), the Court upheld similar legislation based upon the fact that a woman's "physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man." *Id.* at 381.

According to the "truism" which held sway until recent times, women were "the weaker sex" and certainly unsuitable for military service. Yet today women serve in 384 of the army's 419 MOS's ("Military Occupational Specialty"). See "Getting Straight on WAAC's", 23 Army Reserve Magazine 7, 8 (January/February 1977). And, just as women are finding increased employment in the armed forces, handicapped persons too are increasingly employed in the military.

The Air Force for instance has long been a leader in the hiring of handicapped individuals. As of December 31, 1977, the Air Force employed 24,687 handicapped employees including disabled veterans. Air Force Affirmative Action Plan—1979 ("Air Force Plan"). In addition to having a large overall handicapped population, "statistical breakdowns of employment location indicate that all major organizational elements of the Air Force (Major Commands and Separate Operating Agencies) are well represented in numbers and types of handicapped employees." Air Force Plan, Objective 5. Handicapped employees of

the Air Force "are being promoted at the same or better rate" than the Air Force's total work force. "All Air Force handicapped employees are routinely considered for positions filled under the Air Force Upward Mobility Program." The handicapped work force fares as well as, or better than, the nonhandicapped work force. Air Force Plan, Objective 6. To ensure employment, the Air Force has completed a survey of all installations to identify architectural barriers. As new handicapped employees are hired or when current employees develop a handicap, the employee's work site is analyzed to determine what, if any, architectural barriers need to be eliminated and what other types of equipment, warning devices, etc., are needed for the employee to be able to perform effectively and safely. Air Force Plan, Objective 9.

Amici respectfully submit that if Southeastern Community College took the same positive view taken by the Air Force, Ms. Davis would now be a registered nurse. Instead, the College, relying on archaic notions concerning the ability of handicapped persons, has imposed unnecessary, unfair and illegal barriers to Ms. Davis' efforts to be treated like a normal human being, entitled to shape her own course in life. Patricia Harris, Secretary of the Department of Housing and Urban Development, speaking at the White House Conference on Handicapped Individuals (May 25, 1977) said, quoting Helen Keller:

> "A person who is severely impaired never knows his hidden sources of strength until he is treated like a normal human being and encouraged to shape his own life."

In enacting §504, Congress sought to make participation in society more feasible for handicapped individuals. Ms. Davis seeks to convert the Congressional promise into reality. In the past two decades the nation has come to realize that Americans with disabilities are an oppressed and, all too often, hidden minority, subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens. The federal government has made a commitment to end this unconscionable discrimination against our nation's handicapped. Beginning in 1948 with the congressional enactment of Public Law 87-614, which prohibited the federal Civil Service from discriminating against a person on the basis of physical handicap, 5 U.S.C. §7153, the federal government has established the legal framework with which to end discrimination for a majority of handicapped Americans in employment and elsewhere.

Senator Birch Bayh, in a foreword to the symposium issue on Employment Rights of the Handicapped, stated that congressional enactment of §504 "may be one of the most important pieces of legislation in our nation's history". 27 DePaul L.Rev. 943, 944 (1978) (hereinafter DePaul). Senator Bayh there stated that the right to work is one of the most basic of all our cherished rights, giving an individual "not only economic self-sufficiency, but also a sense of dignity, self-worth, and the satisfaction of making a contribution to our society". DePaul at 943. Explaining the high unemployment rate of the handicapped, and the underemployment rate of the handicapped, and the underemployment of handicapped persons, Senator Bayh stated that "the most crucial deterrent to employment seems to be attitudes of employers. Acting upon stereotypes,

many employers fear that the handicapped person will be unable to perform assigned tasks. This attitude exists despite studies showing that a handicapped worker, when assigned to an appropriate position, performs as well or better than his nonhandicapped coworkers." DePaul at 944.

Approximately four years after Congress enacted §504, and after an action was initiated to force the Secretary of HEW to promulgate a regulation implementing that statute (*Cherry v. Matthews,* 419 F.Supp. 522 (D.C. 1976)), Secretary Califano issued a press release ("release") announcing the issuance of his regulation.[3] The Secretary's release states:

> "I am issuing a regulation, pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans—the blind, the deaf, persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps. The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law." Release, pages 1-2.

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[3]The release was dated April 28, 1977. The regulation was published May 4, 1977, 42 Fed.Reg. 86. The effective date of the regulation is June 3, 1977 The regulation may be found in Title 45 Code of Federal Regulations, Sec. 84.

Secretary Califano recognized that the statute and the implementing regulation were meant to work fundamental changes in many facets of American life. The implementing regulation he stated, "Calls for dramatic changes in the action and attitudes of institutions and individuals who are recipients of HEW funds." Release, page 2. The Regulation, he stated, "not only bars recipients of HEW funds from unfairly excluding handicapped individuals, but it also requires positive steps to give handicapped citizens meaningful equality of opportunity. . . . Discriminatory practices directed toward handicapped persons—just like those directed at racial minorities and women—are often deeply ingrained. We must recognize that positive steps will, in some instances, be required so that handicapped individuals are able to learn, to work, and to compete on a fair and equal basis. Admitting a deaf child to a class, for example, is a meaningless gesture unless an interpreter is also available to communicate the teacher's words." Release, page 6.

Finally, Secretary Califano stated, "The 504 Regulation today becomes the law of the land, and it is critically important that we obey that law and make these new rules a reality for handicapped Americans."

Recently, Congress passed and the President signed the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978. The Floor Manager for the Bill was Senator Cranston. Speaking on the Bill on August 16, 1978 (Congressional Record, 95th Cong., 2d Sess. Vol. 124, No. 12147) Senator Cranston stated:

> "Mr. President, there is a great new civil rights struggle going on in our country. Long neglected

> Americans are seeking, with good reason, their full and equal share of the rights to which all are entitled in our land. Accessibility for handicapped individuals must be viewed in that context —it is an issue of civil and human rights. I believe strongly that we must assure that the rights and opportunities accorded every other American are accorded to handicapped Americans."

Addressing himself to the new provisions for attorneys fees under §504 actions, the Senator stated:

> "Such allowance of attorneys fees would be an important step in assisting all handicapped individuals in their struggle by permitting equal access to the courts to enforce the provisions of Title V of the Rehabilitation Act of 1973. . . . [T]he rights extended to handicapped individuals under Title V of the Rehabilitation Act of 1973 . . . non-discrimination under Federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Private enforcement of these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys fees should assist substantially in this respect."

Senator Cranston's statement echoes the long established public policy of the United States designed to integrate—rather than segregate—disabled persons. On December 7, 1974, Congress enacted the White House Conference on Handicapped Individuals Act (Title III of Pub.L. 93-516, 88 Stat. 1631-1634; see Historical Note under 29 U.S.C. §701) stating:

> "The benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps"; "It is of critical importance to the nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps."

On September 7, 1978, the President of the United States declared (Proclamation 43 F.R. 40197; 1978 U.S. Code Cong. and Adm. News, p. 3508):

> "Our country's greatest resource is its people—including those with physical and mental disabilities . . . local, state and Federal laws and regulations are beginning to ensure equal rights to the disabled, so that they will no longer be second-class citizens. . . . The private sector, too, is being made aware of its duties and responsibilities. . . ."

In *Bartels v. Biernat,* 405 F.Supp. 1012 (E.D. Wis. 1975), Judge Warren, discussing the public interest in having mass transportation available to handicapped persons, stated:

> "[S]ociety has a distinct interest in utilizing every possible source of human skill and ingenuity, including the skills and talents of mobility handicapped individuals. When effectively confined . . . not only are the handicapped deprived of the myriad benefits of society, but society is deprived of the valuable contributions of these otherwise normal human beings. And this deprivation is compounded by the fact that, when unable to fend for themselves, the handicapped must depend

upon the public purse for their sustenance. This is a burden that should be inflicted upon neither the . . . handicapped nor society in general." *Id.*, 405 F.Supp. at 1015-16.

II

Section 504 Absent Regulations Requires Recipients of Federal Financial Assistance to Make Reasonable Accommodation to the Limitations of a Handicapped Person.

Petitioner and the Commonwealth of Massachusetts and other state amici ("Massachusetts Brief") argue, relying on the "otherwise qualified" language in §504, that §504 imposes no obligation on a recipient of federal financial assistance other than not to arbitrarily exclude because of a handicap (Petitioner's Brief pp. 22-30; Massachusetts Brief pp. 13-15). Certainly §504 prohibits arbitrary exclusion. *Duran v. City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977).

But §504 goes farther than merely outlawing a federal financial recipient's arbitrary treatment to a handicapped person or group. Section 504 protects those who are denied equal opportunity both because of the stigma attached to their disability and because their disability requires an individualized approach. The Aesop's fable looked to in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), provides guidance here as well. When looking to the Title VII objectives of equal employment opportunity, this Court observed:

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation."
>
> *Griggs v. Duke Power Co., supra,* 401 U.S. at 431.

The procrustean application of entrance and participation requirements may be a practice which is fair in form but discriminatory in operation when it excludes persons from participation solely because of a handicap. Recipients of federal financial assistance may be required to do more than set the table with vessels from which the foxes can drink; they may also be required to set the places of the storks with vessels from which they too can drink.

Congress' reference to "accommodation" in §505(a)(1), 29 U.S.C. §795(a)(1), added by the 1978 amendments to the Rehabilitation Act, indicated Congress understood the prohibition against discrimination on the basis of handicap in Title V of the Rehabilitation Act, 29 U.S.C. §791 *et seq.*, incorporated an obligation to accommodate to the limitations of the protected class.

Relevant here is the reasoning of the Supreme Court of the State of Washington in *Holland v. Boeing*, 90 Wash.2d 384, 583 P.2d 621 (1978). In that case the court concluded that a state statute prohibiting employment discrimination on the basis of handicap necessarily included an affirmative obligation to accommodate to the limitations of the handicapped individual:

"In 1973, the legislature amended the law against discrimination . . . to include a prohibition against discrimination in employment because of physical, mental, or sensory handicaps. It recognized that the disabled, like many minority groups, face serious problems in seeking employment. . . . Legislation dealing with equality of sex or race was premised on the belief that there was no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.

"The physically disabled employee is clearly different from the nonhandicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment *fails* to take into account the unique characteristics of the handicapped person. . . . Identical treatment may be a source of discrimination in the case of the handicapped, whereas *different* treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.

". . . When, in 1973, the legislature chose to make this policy applicable to discrimination against the handicapped, we believe it is clear it mandated positive steps be taken. An interpretation to the contrary would not work to eliminate discrimination. It would instead maintain the *status quo* wherein work environments and job functions are constructed in such a way that handicaps are often intensified because some employees are not physically identical to the 'ideal employee'." *Id.*, 583 P.2d at 623.

Thus analyses of statutes protecting the civil rights of blacks which are premised on the belief that there was no inherent difference between them and the general public are not necessarily applicable to a statute protecting the civil rights of a protected class whose differences are recognized and are indeed the basis for being in a protected class. Petitioner's reliance (Petitioner's Brief p. 23) on this Court's interpretation of 42 U.S.C. §1971(c) in *United States v. Mississippi*, 380 U.S. 128, 138 (1965) is therefore misplaced. Lower courts have found that §504 requires recipients to accommodate to the limitations of handicapped persons so that they may have equal access to federally assisted programs. *Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D. W.Va. 1976) ("School officials must make every effort to include such [handicapped] children within the regular public classroom situation, even at great expense to the school system."); *Sherer v. Waier*, 457 F.Supp. 1039 (W.D. Mo. 1977). But the concept that equal access may require differential treatment is not unique to the handicapped. For instance, equal access to the criminal justice system has been held to require accommodation to the financial limitations of the accused. *Douglas v. California*, 372 U.S. 353 (1968). Similarly, equal access to state courts for divorce has been held to require accommodation to the financial limitations of the petitioner or respondent. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Further, the Due Process Clause requires a form of notice reasonably calculated, under all the circumstances, to reach him whose property interest may be affected by a particular action. This may mean

different forms of notice for different classes of persons. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-320 (1950). In *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956), this Court ruled unanimously that where the town officials giving notice knew the taxpayer intended recipient was incompetent, the officials were required to take measures in giving notice beyond those deemed sufficient in the case of an ordinary taxpayer. In essence, the town officials were required to accommodate to the taxpayer's handicap.

In *Sherbert v. Verner*, 374 U.S. 398 (1963) this Court ruled that absent of a compelling state interest justifying the burdening of the Sabbatarian's free exercise of religion by disqualification for unemployment insurance by her refusal to work Saturdays, the free exercise guarantees of the First Amendment barred the state from applying the general rule to the Sabbatarian—*i.e.*, it required the state to treat differently those who were unavailable Saturday because of Sabbatarian beliefs and those who were unavailable Saturday for other reasons.

A. Section 504 Does Not Require the Hiring of Blind Bus Drivers.

Petitioner and the Massachusetts Brief argue that any interpretation of §504 other than that advanced by them and the district court would necessarily result in, for instance, the hiring of blind bus drivers or the admission into law school of someone who, due to a learning disability, could not remember things (Petitioner's Brief p. 41; Massachusetts Brief p. 7). Petitioner and the Massachusetts Brief are incorrectly applying §504.

Where an individual has been excluded from access to or participation in a federally assisted program because of[4] his handicap, the first inquiry is whether or not the handicap interferes with the ability to participate in or benefit from the federally assisted program.[5] If the handicap does not so interfere with this ability to participate in or benefit from the federally assisted program, then exclusion on the basis of handicap cannot be justified. Petitioner and the Massachusetts Brief would stop here and go no farther. But if the handicap in fact interferes with the ability to participate in or benefit from the federally assisted program, then the next inquiry is whether the handicap can be accommodated so as to eliminate or minimize the handicap barrier to participation. HEW, the agency charged with the enforcement and administration of §504 has set out guidelines for reasonable accommoda-

---

[4]Part of petitioner's and the Massachusetts Brief's problems with the statute's "otherwise qualified" language and the HEW regulations may stem from a failure to appreciate HEW's dual role of promulgating guidelines and enforcing compliance, and the regulations' role in serving these two ends. HEW has therefore set out an analysis model which assists it in determining whether an adverse action took place "because of" a handicap and if so, whether the action was nonetheless justified. The regulations' dual role is seen most clearly in the regulations relating to the timing of physical examinations in connection with employment. There is no substantive reason for the timing set out in the guidelines other than meeting the agency's compliance monitoring needs. *Compare* 41 CFR §60-741.6(c)(3) with 45 CFR §84.44 (a) and (c).

[5]Potential discrimination by others after graduation cannot justify exclusion from an education program. Women could not be excluded from a job training program because of the difficulty they would face seeking employment in a traditionally male area. *Cf., Thorn v. Richardson*, Civ. No. 9577, 4 FEP Cases 299 (W.D. Wash. 12-10-71). Nor could women be excluded from a correctional officer training program because some of the jobs available upon graduation would be BFOQ male. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 332-36 (1977).

tion to the handicap barriers to participation in educational programs. 45 CFR 84.44. But the handicap barrier of a learning disability which resulted in the person not being able to remember things obviously is one that cannot be eliminated or minimized through accommodation in the way that a barrier of blindness can be minimized by a reader, a barrier of mobility limitation can be minimized by a ramp, a barrier of a hearing impairment can be minimized by interpreters or/and special instruments.[6] Similarly the barrier of blindness and concomitant interference with safe driving is simply a barrier that is not amenable to accommodation.

B. The Obligation to Make Reasonable Accommodation to the Limitations of a Handicapped Person Is Not Limited to Employment by the Federal Government or a Federal Contractor.

Petitioner's Brief (at pp. 51-52) and the Massachusetts Brief (pp. 14-15) argue that because Section 504 does not contain the words "affirmative action" as do both Sections 503 and 501, only those provisions impose an obligation to make reasonable accommodation to the limitations of handicapped persons. Further, since Sections 503 and 501 relate only to employment, petitioner and the Massachusetts Brief argue that accommodation is relevant only to employment.

However, affirmative action is one of the means by which §504's equal access, nondiscrimination objectives are met. Congress made it plain that "where applicable, §504 is intended to include a requirement of

[6]The articles about deaf health professionals are attached in Appendix "A".

affirmative action as well as a prohibition against discrimination." Section 504 is couched in terms of objective or end result which Section 503 is couched in terms of process. Compare

> ". . . the party contracting with the United States *shall take affirmative action to employ and advance qualified handicapped individuals. . .*."
> Section 503, 29 U.S.C. §793(a).

with

> "No otherwise qualified handicapped individual . . . *shall . . . be excluded from participation in, be denied the benefits of,* or, *be subjected to discrimination under any program* or activity receiving Federal Financial assistance."
> Section 504, 29 U.S.C. §794.

C. Section 504 May Require Accommodation Involving More Than "De Minimis" Cost.

Both petitioner (at p. 56 of its brief) and the Massachusetts Brief (at p. 19) rely on this court's decision in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) as supporting their position that economic considerations justified exclusion of Ms. Davis even should this court hold that reasonable accommodation is required under §504. That reliance is misplaced.

First, Title VII is applicable to all employers, with few exceptions, with 15 or more employees. 42 U.S.C. §2000e(b). By way of contrast, §504 applies only to those programs receiving federal financial assistance —not necessarily all of a recipient's activities. The §504 protections and obligations are imposed as a condition of receiving the federal financial assistance. Certainly since the issuance of the HEW regulations

any recipient of federal financial assistance understands the price of that assistance.

Second, in *Hardison* one of the factors about which this Court expressed concern was the impact of the accommodation to Mr. Hardison's religious beliefs on other employees and the potential discrimination against the other affected employees. 432 U.S. at 81, 84-5. Under §504 there is no such impact. Even assuming some dislocation of another program participant to accommodate to the needs of a handicapped program participant (*i.e.*, involuntary switching of a student from a downstairs accessible class to an upstairs class to accommodate to the limitations of a mobility impaired student), the status of being "nonhandicapped" is not a protected class and there is no "reverse" discrimination problem. Further, Mr. Hardison sought an accommodation which would have required TWA "to carve out a special exception to its seniority system . . ." 432 U.S. at 83. Under Title VII, however, seniority systems are afforded special treatment and action pursuant to a bona fide seniority system is not unlawful. 42 USC §2000e-2(h).

Third, all able-bodied persons may potentially be members of the class protected by §504. Through accident, disease, wear-and-tear, criminal assault, any one of the able bodied may develop involuntarily limitations requiring accommodation for equal participation. But conversion to a religious belief requiring special accommodation is not something which can be equated with the involuntariness of acquiring a disability.

Fourth, this Court's interpretation of the employer's duty to accommodate to the religious practices of its employees avoided a potential First Amendment Establishment clause problem. 432 U.S. at 70-71. No such problem exists under Section 504.

The Massachusetts Brief in support of petitioner asserts that it fully supports equal rights for handicapped individuals, as well as the purpose of §504 but, because of the "enormous financial and other burdens" associated with the administration of §504, opposes Ms. Davis' claim (at p. 2). The Massachusetts Brief (n.2, p. 2) points to a cost survey prepared by HEW estimating that the annual pecuniary cost of compliance with §504 has been set at 3.2 billion dollars.[7] It suggests that the expenditure of such a large sum of money to help end the shameful national neglect of handicapped individuals reflects a lack of "sensitivity to the legitimate interests of both state and national governments."[8] In so arguing, the Brief writers forget that our country's greatest resource is its people, including individuals with disabilities. The Massachusetts Brief asks this Court to give §504 and its implementing regulation a "practical" interpretation in light of economic burdens.

---

[7]Much of the cost of accommodation is a function of facilities and roads built over the years without regard for the disabled segments of our society which have always been with us. Had access been built in initially, the cost of access would have been negligible and spread over decades. Further, there are often public and private sources other than the federally assisted program to pick up some of the costs of cost of accommodation —*i.e.*, services provided through state departments of vocational rehabilitation, charitable and volunteer groups, etc.

[8]Further, the Massachusetts Brief evaluates the cost of needed accommodation in a vacuum. Public expenditures for accommodating an education program may be offset by the elimination of the student's dependence on the public for support, by his becoming a taxpayer or more of a taxpayer. Indeed it is just such objectives of increased earning power and productivity of post-secondary graduates that cause states to fund public college and university systems. These objectives are no less present when the student is disabled.

A similar argument was made and rejected by this Court in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978). In that case the Court of Appeal held that upon a showing that the existence of the snail darter would be jeopardized by completion of the Tellico dam it was the duty of the district court under the Endangered Species Act to enjoin completion of the dam. The Court of Appeal, while recognizing the irretrievable loss of millions of dollars of public funds which would accompany injunctive relief, nonetheless decided that the Act explicitly commanded precisely that result, saying:

> "It is conceivable that the welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final millions of dollars already expended for Tellico in excess of its present salvageable value." 549 F.2d at 1074.

This Court affirmed. Mr. Chief Justice Burger, writing for the court, stated that Congress had spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities. Since that legislative power was exercised he said it is up to the executive branch to administer the law and for the judiciary to enforce. The Court acknowledged that it may seem curious to some "that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than 100 million dollars. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after Congressional appropriations committees were apprised of its

apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result." 437 U.S. at 172-3.

Mr. Chief Justice Burger refused to attempt to balance "the burden on the public through the loss of millions of unrecoverable dollars" with "the loss of the snail darter," saying:

> "Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even 100 million dollars—against a congressionally declared 'incalculable' value, even assuming we have the power to engage in such a weighing process, which we emphatically do not." 437 U.S. at 187-88.

In reply to the contention that the relevant Congressional statutes be interpreted "reasonably" and in accord with some modicum of common sense and regard for the public weal the Chief Justice stated:

> "But is that our function? . . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. . . .
>
> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> * * *

> "We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense in the common weal.' " 437 U.S. at 194-5.

In §504, the Congress sought to translate many of the legitimate needs of handicapped persons into legal rights. The Congress intended the law to work fundamental changes in many facets of American life and knew that it would cost money to implement the unequivocal statute. Congress also knew that, when unable to fend for themselves, the handicapped must depend upon the public purse for their sustenance. This imposes an even greater economic burden on society. More importantly, however, Congress concluded that the welfare of human beings with handicaps weighs more heavily upon the public conscience than the expenditure of large sums of money to aid handicapped persons seeking their full and equal share of the rights to which all are entitled in our land.

March 30, 1979.

Respectfully submitted,

MARILYN HOLLE,
Western Law Center for the Handicapped,

STANLEY FLEISHMAN,
FLEISHMAN, BROWN, WESTON & ROHDE,
Counsel for Amici Curiae.

APPENDIX A

NEWSOUNDS (MARCH-APRIL, 1976).

Ann Keenan: ODAS Member Helps Others to Succeed

The effectiveness of early auditory training is evident in the lives of hearing impaired persons who successfully enter professions often denied those with a hearing loss. A case in point is Ann Keenan, RN, severely deafened (80 dB loss) as a result of chicken pox at age 3. Ann works in the advanced care and rehabilitation unit at Memorial Hospital Medical Center in Long Beach, California with patients, age 18 to 100 years, who are learning to cope with the effects of total joint implanation, stroke, paraplegia, and quadriplegia. As staff nurse, she is responsible for patient care and treatment, which includes communication with patients and their families in an attempt to meet psychological and spiritual, as well as physical, needs. Ann notes

that her success in overcoming a handicap gives her patients a sense of security and support. "If they see I can do it, they'll think they can do it too."

An active member of ODAS, Ann often talks to parents of hearing impaired children, encouraging auditory training and speech development. She continues to develop her own communication abilities and residual hearing through speech therapy.

Ann is a graduate of a three-year program at St. Anthony's School of Nursing in Rockford, Illinois. She began speech therapy and lipreading training at age 4 and spent most of her childhood in regular classrooms. Her nursing career resulted in part from her exposure to the medical world through her physician father. As a teen-ager, she developed confidence in her ability to communicate with normally hearing people while working as a nurse's aide. She feels that, as a nurse, she is given an opportunity to work with people undergoing the stress of physical impairment.

NEW AMERICAN DEAF (FALL 1977).

A Medical First for Guinness' Book

Frank Hochman, M.D., has been selected as a resident physician by the Family Practice Program at San Francisco General Hospital.

San Francisco General is a part of the University of California School of Medicine, and a prestigious appointment.

So what has that to do with Guinness' Book of Records?

A hint. Dr. Hochman received his early education at Junior High School 47 in New York City. Oh ho! The light is beginning to dawn, right?!

Frank Hochman is the first congenitally deaf graduate of a medical school, having received his M.D. degree from Rutgers in New Jersey.

His other educational feats include: BS from City University of New York; MS in Medical Science from Rutgers.

Dr. Hochman is planning to deliver medical care to the hearing-impaired population of the Bay Area, a considerable boon to our community because it is said that the good doctor is fluent in sign language.

Special hours have been set aside for hearing-impaired patients: 1:30 to 4 p.m. at the Family Health Center, S.F. General Hospital, 22nd and Potrero.

The phone number is: 565-8606, no TTY as yet.

IMPACT 10 (JUNE 23, 1978).

Deaf Dentist's Hobby: Public Speaking

James C. Marsters, DDS, is deaf.

In his Pasadena, Calif., office, Dr. Marsters moves briskly about his business. He handles telephone calls by having his assistant listen in on another phone and repeat the message. Dr. Marsters reads her lips and then replies in a clear voice. Everyone who knows him is struck by one thing: He is an unusually gifted lipreader. That and his native intelligence and drive have helped make him what he is.

For calls to friends who are deaf, Dr. Marsters moves into an adjoining office, where he has a teletypewriter hooked up to his phone. He is the founder of TDI, Teletypewriters for the Deaf, Inc., an international organization that hopes to make telephone communications for the deaf a reality.

Dr. Marsters' wife, Alice, formerly director of Los Angeles' John Tracy Clinic Nursery for the Deaf, is hearing, as are their three children.

When he is not practicing dentistry or pursuing such favorite hobbies as flying airplanes and gliders, camping, sailing, and photography, Dr. Marsters works on the passion of his life; improving educational opportunities for deaf children. He thinks every deaf child can grow up successfully. Just like Dr. Marsters, who has yet another favorite hobby: public speaking.

Most observers would say that for a child born deaf, a future as a happy professional is the impossible dream. They may be right, but tell them to try to pass this off on the deaf orthodontist in Pasadena.

MOTION FILED
APR 16 1979

No. 78-711

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHEASTERN COMMUNITY COLLEGE, PETITIONER

v.

FRANCES B. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

PETER BUSCEMI
ANDREW J. LEVANDER
Assistants to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
VINCENT F. O'ROURKE, JR.
STEPHEN L. MIKOCHIK
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, PETITIONER

v.

FRANCES B. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Solicitor General, on behalf of the United States, moves this Court for leave to file a brief as amicus curiae after the time limit specified by Rule 42(2) of the Rules of the Supreme Court. Cf. Rule 42(4).

This case raises important questions under the Rehabilitation Act of 1973, and will be the first case decided by this Court under that Act. The United States has not previously filed a brief in this case. Formulating a position on the issues involved

has required careful examination of the extensive legislative history of the Act and its 1974 and 1978 amendments, as well as analysis of the extensive regulations issued under Section 504 of the Act, after the district court's decision in this case, by the Department of Health, Education, and Welfare. Consultation between lawyers in that Department and in the Department of Justice has also been required.

While the United States has substantially improved the timeliness of its filings in this Court during the present Term, the preparation of amicus briefs in cases with which the government has not been familiar and in which it has not previously formulated a position has for many years presented special problems. These problems have been compounded this Term by the current state of the Court's docket, which has permitted very few extensions of time to be granted for the filing of briefs on the merits, either in our own cases or in the many additional cases in which we have concluded that it is in the public interest to state the views of the United States as amicus curiae. And, as it happens, the United States was called upon to file briefs in an unusually large number of cases to be heard in the March and April argument sessions—approximately 12 in March, followed by approximately 16 in April.

While we are acutely aware of our obligation to minimize inconvenience or unfairness to the parties before the Court, we must also be conscious of our duty to the Court, to the Congress, and to the many individuals and institutions that will be affected by

this Court's decisions, to formulate the position of the United States with fairness and due care and, in statutory cases, with fidelity to the congressional intent. While we regret that the effort to do so in this case extended beyond the time specified in this Court's rules,* we believe that the views of the United States on the important federal statutory issues involved in this case should be before the Court and the parties and that they will assist the Court in resolving the questions presented.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

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* Respondent's brief is dated March 31, 1979. On April 13, 1979, we hand-delivered to counsel for the petitioner in Chapel Hill, North Carolina, a typescript copy of most of our brief, together with a copy of our briefs in *Cannon* v. *The University of Chicago* (No. 77-926), on which the remainder of our brief was to be based. A complete typescript (except for summary of argument) was mailed to the parties on Saturday, April 14, 1979, and the completed typescript was submitted to the Court on Monday, April 16, 1979, with printed copies to follow as soon as available.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, PETITIONER

v.

FRANCES B. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance or * * * conducted by any Executive agency or by the United States Postal Service." The statute requires each executive agency to promulgate regulations governing enforcement of the antidiscrimination provision with-

in the federal government. In addition, the United States Department of Health, Education, and Welfare (HEW) has substantial responsibility for implementing Section 504 in connection with federally funded programs conducted by private institutions and state and local governments. Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976), directed the Secretary of HEW to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." The Secretary was also instructed to "coordinate the implementation of section 504 * * * by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity * * * and [to] consult with such departments and agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of section 504." In the exercise of his responsibility under the Executive Order, the Secretary has issued detailed regulations. See 45 C.F.R. Parts 84 and 85. Under the Secretary's regulations, federal grant agencies that detect actual or threatened violations of Section 504 may refer the matter to the Department of Justice with a recommendation that appropriate judicial proceedings be brought to enforce the rights of the United States under the statute. See 45 C.F.R. 84.61 and 45 C.F.R. 80.8.

This case concerns the interpretation of the anti-discrimination provision in Section 504. The Court's decision may also affect the validity of the administrative construction given the statute in HEW's regulations. Because the regulations and the statute directly affect the actions of all federal agencies and all recipients of federal funds, the United States has a substantial interest in this case.

QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded respondent's suit to the district court for reconsideration in light of new federal regulations implementing Section 504 of the Rehabilitation Act of 1973.

2. Whether respondent is entitled to enforce her rights under Section 504 in a private judicial proceeding.

3. If so, whether respondent is required first to exhaust any available administrative remedies provided by a federal funding agency.

STATEMENT

A. Facts

Petitioner Southeastern Community College is a public educational institution in Whiteville, Columbus County, North Carolina. The school offers programs in "various fields of vocational and professional instruction" and receives "various forms of Federal financial assistance" (A. 17a). Respondent is a licensed practical nurse and a citizen and resident of North Carolina. She received her professional license from the State in 1967, and the license is currently in good standing. Since she received her license, re-

spondent "has from time to time been actively engaged and employed" as a practical nurse (*ibid.*). She is 46 years old (A. 116a, 117a).

In March 1973, respondent applied for admission to Southeastern Community College (A. 116a-122a). She indicated on her application that she planned to study nursing. As part of her application, respondent submitted a "Pre-Entrance Medical Record" on which her family physician noted that she had "some decrease in hearing"; he also stated that she had no handicap and that she was justified in undertaking the program in professional nursing (A. 119a-120a). Also as part of the application process, respondent was interviewed by a representative of the College. In her written report of the interview (A. 154a-157a), the College official observed that respondent had a "hearing difficulty" and was "very difficult to interview [because she r]equested repeat of almost all statements—though we were sitting face to face." The interviewer reported further that the problem continued even after she attempted to compensate for respondent's hearing loss (A. 155a). Notwithstanding the interviewer's low rating of respondent's "[a]bility to communicate" (A. 154a), she was accepted for admission to petitioner's College Parallel program, a course of study designed to prepare students for admission to the College's Associate Degree Nursing Program (Pet. App. 13a). In the letter of acceptance sent to respondent, petitioner stated (A. 123a):

> It is our understanding that you would like to enter the Associate Degree Nursing Program in September of 1974. If so, your progress will be evaluated at the end of this year to determine your acceptance into the nursing program. If you are accepted, your program will still require two additional years after this year.

During the academic year 1973-1974, respondent successfully completed the College Parallel program and in the spring of 1974 College officials considered her for admission to the Associate Degree Nursing Program. The latter program entails both classroom and clinical instruction (A. 49a-51a) and is intended to train students for certification as registered nurses (Pet. App. 3a). Respondent apparently did not file a separate application for the Associate Degree program (A. 36a-37a), but in March 1974 she was interviewed by a College official seeking to evaluate her fitness for nurse's training. The written report of this interview is reproduced in the Appendix filed by the parties in this Court (A. 158a-161a; see also A. 27a-32a). The interviewer stressed respondent's hearing difficulty and asserted that she would encounter problems in the Associate Degree program because of her inability to hear normally.

The College's admissions committee met in April 1974 and reached a preliminary decision to deny respondent's application. The committee requested that respondent provide more specific information about her hearing ability and told respondent that she

could be examined by a physician of her choice (A. 37a). In accordance with the committee's request, respondent was examined by an audiologist at the Duke University Medical Center in Durham, North Carolina. The doctor's reports indicated that respondent has a moderately severe bilateral sensori-neural hearing loss and a speech discrimination loss that make it difficult for her to understand speech because of the distortion in her hearing (A. 124a, 127a). The audiologist determined that the hearing aid then being worn by respondent provided little or no help (A. 125a) but that a proper hearing aid would improve her hearing to a level at the outer limits of the normal range (A. 125a, 127a-128a). The doctor further stated that respondent is an excellent lip reader who can perform satisfactorily in most listening situations if she is permitted to see the speaker and to use her vision for assistance in interpreting speech (A. 128a; see also Pet. App. 14a-15a).

Based on the audiologist's diagnosis, the College's admissions committee determined that respondent did not qualify for the Associate Degree Nursing Program. The committee notified respondent of its decision (A. 129a-130a), and the decision was subsequently ratified by the full nursing faculty (A. 69a-71a). The faculty members believed that respondent's need to rely on her lip reading ability would prevent her from participating safely in certain clinical portions of the nursing program and in professional situations in which doctors and nurses wear surgical masks or

in which communications are hurried (A. 29a, 31a, 34a, 71a, 76a, 89a, 96a).

Before respondent's application was considered by the full eight-member faculty, the director of the College's nursing program asked the Executive Director of the State Board of Nursing for the Board's opinion regarding respondent's ability to participate safely in the program. In a telephone conversation, the Executive Director indicated that she shared the admissions committee's concern that respondent's hearing disability might preclude her safe participation. Before a written response was received from the State Board, the faculty decided not to admit respondent (A. 70a). Shortly thereafter, the College received a letter from the State Board's Executive Director (A. 132a-134a). She wrote:

> We concur with your opinion as stated on the telephone, that [respondent's] hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, or by a license as LPN. Moreover, we would question the advisability of you and the faculty's assuming responsibility for [respondent's] involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with [respondent's] hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs.
>
> * * * * *
>
> Both you and I can identify innumerable patient care situations in which this lady's abilities * * * would be inadequate to respond to the patient needs; in fact, it would be inadequate for

her probably to identify all of the patient's needs for which she would be accountable or even to pick up some clues to situations that could be quite critical to the point of life, death, situations.

* * * * *

[W]e do not believe, on the basis of facts we have now, that [respondent] would either be safe for herself, or for patients, or for faculty to pursue a nursing education program.

In June 1974 respondent asked the College to reconsider her application (Pet. App. 16a; A. 63a-64a). At petitioner's request, respondent communicated with Southeastern General Hospital (A. 67a), one of the facilities in which the nursing program's clinical training was conducted (A. 46a); respondent inquired whether the hospital would employ her if she became a registered nurse. The Director of Nursing Service at the hospital stated that there were a number of positions both inside and outside the hospital in which respondent could function adequately as a registered nurse (A. 140a-141a; 144a-145a).[1]

[1] The Director's letter (A. 141a) observed that "[o]n a busy, noisy unit it would be difficult [for respondent to function adequately] but in areas such as long term care, a doctor's office or even industrial she could do well." To the College's specific inquiry whether respondent could be employed at Southeastern General, the Director replied that she would employ respondent in the hospital's Skilled Nursing Facility if a vacancy became available there. The Director also stated that respondent could handle positions in the new Methodist Home or on night assignment in the hospital's Post Partum Unit (A. 144a-145a). The Director's letter did not indicate that any additional supervision would be required to enable respondent to perform her responsibilities in those positions.

In the course of reconsidering respondent's application, petitioner asked the North Carolina Board of Nursing whether respondent could be licensed as an RN if she successfully completed the Associate Degree Nursing Program (A. 137a). The Board's Executive Director responded (A. 138a-139a):

[O]ne requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse (or to licensed practical nurse where appropriate) includes evidence that an applicant has no limitations, physically, emotionally, or mentally to prevent the applicant from practicing nursing after licensure without restriction of any kind on the license. * * * [I]t is our opinion that [respondent] has hearing limitations which could interfere with her safely caring for patients. * * *

* * * * *

We cannot, at this time predict eligibility or ineligibility for the licensing examination should [respondent] enroll in, and be allowed to complete the program some several years hence.

After reviewing the available information, the College adhered to its earlier decision on respondent's application. Petitioner's Dean for Student Development wrote to respondent and informed her of the school's action. He stated (A. 147a-148a):

On the basis of the audiologist's report; the reservations noted earlier from the North Carolina Board of Nursing; and conferences with you, in which your hearing difficulty was noted and discussed; members of the Southeastern

Community College Nursing faculty are not willing to accept you as a student in the Associate Degree Nursing Program. A basic inconsistency which they noted is the fact that your hearing limitation would require restricted or limited clinical experiences as a student and the North Carolina Board of Nursing requires that no limitations be placed on the possible licensure of applicants.

B. The District Court Proceedings

In September 1975 respondent filed this suit in the United States District Court for the Eastern District of North Carolina. Her complaint alleged that petitioner, acting under color of law, rejected her application for admission to the nursing program on the basis of her hearing disability, and thereby denied her her rights under the Constitution and laws of the United States (A. 2a-9a). Respondent's complaint alleged (A. 5a) that her cause of action arose under 42 U.S.C. 1983.

Based on documentary evidence introduced by respondent and documentary and testimonial evidence introduced by petitioner, the district court found that the College did not deprive respondent of her rights under either the Fourteenth Amendment or Section 504 of the Rehabilitation Act of 1973 and therefore that no violation of 42 U.S.C. 1983 had been established (Pet. App. 12a-21a).

The court rejected respondent's constitutional claim on the ground that petitioner's decision to deny her admission was not arbitrary or capricious, but rather

was based on respondent's "projected inability to be licensed as a Registered Nurse after graduation" and on petitioner's conclusion that "it would be difficult and, in fact, dangerous for plaintiff to even attempt the clinical portion of the training program" (Pet. App. 18a).

The district court rejected respondent's Section 504 claim on similar grounds. The court interpreted the statute to mean that "no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap, renders the person unable to fully and effectively participate in the activity" (Pet. App. 20a). The court stated (*ibid.*) that an "otherwise qualified handicapped individual" within the meaning of Section 504 is one who is "able to function sufficiently in the position sought *in spite of* the handicap, if proper training and facilities are suitable and available" (emphasis added). In the court's view, "[t]he major problem with [respondent's] contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession" (*ibid.*).

The court acknowledged that one of petitioner's faculty members conceded on cross-examination that "with special training and individual supervision [respondent] could perform adequately in some selected fields of nursing" (*ibid.*; see A. 73a-74a; see also A. 53a). But the possibility that respondent, given some special attention, might be able to complete the nursing program successfully and function

satisfactorily in some professional situations did not affect the district court's decision. The court simply concluded that, because respondent cannot participate fully in the existing program without some accommodation, petitioner's rejection of her application did not violate Section 504.

C. The Decision of the Court of Appeals

The court of appeals reversed and remanded for further consideration in light of the implementing regulations promulgated under Section 504 several months after the district court's ruling (Pet. App. 5a-9a). The court noted that under the newly adopted HEW regulations, handicapped persons "otherwise qualified" for post-secondary and vocational education services are those "who meet[] the academic and technical standards requisite to admission or participation in [a federally funded] education program or activity." 45 C.F.R. 84.3(k)(3). In turn, the court observed (Pet. App. 7a), the regulations define "technical standards" as "all nonacademic admissions criteria that are essential to participation in the program in question." Perhaps under the impression that "technical standards" under the HEW regulations cannot include a requirement that an individual be able to perform physical tasks or functions essential to a particular program, the court held that "the college must reconsider [respondent's] application for admission to the nursing program *without regard to* her hearing disability" (Pet. App. 5a; emphasis added). The court also stated that "the

district court erred by considering the nature of [respondent's] handicap in order to determine whether or not she was 'otherwise qualified' for admittance to the nursing program" (Pet. App. 7a). The court expressed no opinion concerning respondent's "scholastic suitability" for nursing studies and emphasized that respondent's "past academic performances would undoubtedly be a highly relevant factor" among the many objective and subjective factors that petitioner may properly consider in making its admission decision (Pet. App. 5a & n.5).

In response to petitioner's argument that the College was not prepared to provide adequate supervision for respondent during her clinical training and could not modify its program to compensate for her hearing disability (see, *e.g.*, A. 53a, 77a), the court of appeals directed the district court on remand to give close attention to HEW regulations dealing with the need for modification of academic requirements in certain circumstances to avoid discrimination against the handicapped (Pet. App. 9a; see 45 C.F.R. 84.44(a)). The court also observed that under HEW's regulations (45 C.F.R. 84.44(d)(1)) handicapped students should not be excluded from federally funded education programs "because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills." The court repeatedly stressed that the correct application of the new regulations to respondent's situation should be determined in the first instance by the district court. The court of appeals did not specify

the extent to which petitioner might be required to modify its nursing program in order to avoid discriminating against the handicapped in violation of Section 504.

With respect to the procedural questions potentially presented by respondent's suit, the court of appeals announced first that it agreed with the district court's implicit determination that a private plaintiff may pursue a cause of action under Section 504, even though the statute does not in terms authorize enforcement through private litigation (Pet. App. 3a-4a). The court of appeals also suggested that on remand the district court might wish to examine the possible interaction between the administrative enforcement mechanism established by HEW's regulations and private lawsuits under Section 504. In particular, the court of appeals posed the following questions for the district court's consideration (Pet. App. 11a n.9):

> (1) What is the effective date concerning the relevant sections of the HEW regulations, if any? (2) Did the promulgation of the Section 504 regulations by HEW * * * create administrative relief that must be exhausted? (3) Is the doctrine of "primary jurisdiction" applicable, and if so, how? (4) Should administrative exhaustion and/or "primary jurisdiction" be applicable, should plaintiff be awarded any relief *pendente lite?*

With one judge dissenting, the court of appeals panel denied rehearing (Pet. App. 1a). Two judges

of the court of appeals who were not members of the panel voted to grant rehearing en banc and indicated that they would affirm the judgment of the district court (*ibid.*).

SUMMARY OF ARGUMENT

I

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against the handicapped in programs or activities receiving federal financial assistance. The statute provides that "[n]o otherwise qualified handicapped individual" shall be excluded from a federally funded program "solely by reason of his handicap." Although it is modeled on other antidiscrimination provisions concerning race, national origin, and sex, Section 504 presents special interpretive problems because it forbids recipients of federal funds from discriminating on the basis of a personal characteristic, physical disability, that in many cases may affect a person's capacity to participate in a particular program or activity.

In enacting Section 504, Congress did not intend to protect only those handicapped persons who can participate fully in existing programs, without any adjustment in program requirements and without any auxiliary aids. On the other hand, Congress also did not mean to require that federally funded programs accept all handicapped persons who meet the nonphysical requirements for a particular job or course of study, even if their physical disabilities prevent

them from completing tasks essential to their employment or education. Rather, Congress designed Section 504 to require recipients of federal funds to make a positive effort to accommodate the handicapped and to implement feasible program modifications where such measures will render funded activities more accessible to handicapped persons.

The legislative history of the 1973 Act provides virtually no guidance for the interpretation and application of Section 504. The materials accompanying the 1974 amendments to the Act are more informative, however. These amendments were produced by the same Congress that originally passed the Rehabilitation Act one year earlier. The committee report on the amendments is, therefore, a highly authoritative aid to the proper construction of Section 504. The report establishes that, in enacting Section 504, Congress intended not only to prohibit discrimination against handicapped persons, but also to require affirmative action on their behalf. Furthermore, the report shows that Congress explicitly directed the Secretary of HEW to issue regulations governing the implementation of Section 504 and to assume responsibility for coordinating the statute's enforcement.

The implementing regulations were promulgated in April 1977. They make clear that, in conducting a postsecondary education program, a recipient of federal funds may restrict admission to persons who can meet all academic and nonacademic criteria essential for participation in the program. If the ability to perform a particular physical task or function is an

essential requirement for participation, then the recipient may insist that that requirement be met by all persons applying for admission, including handicapped persons. But the regulations also provide that persons and institutions receiving federal financial assistance must undertake affirmative efforts to enable the handicapped to participate in funded programs. Recipients must consider the possibility of modifying program requirements to accommodate the handicapped and must make adjustments in existing programs where it is feasible to do so consistent with the need to preserve the programs' essential standards. Fund recipients are also obliged to ensure that handicapped students are not excluded from education programs because of the absence of educational auxiliary aids, such as videotapes or interpreters for the deaf and readers or Braille texts for the blind.

The 1978 amendments to the Rehabilitation Act and the supporting legislative materials demonstrate that the interpretation of Section 504 in the HEW regulations accords with congressional intent. The regulations were submitted to Congress for criticism and comment both before they were issued and at the time of issuance. Congress registered no objection. Moreover, in House hearings on Section 504 conducted several months after promulgation of the regulations, testimony focused on the cost of compliance with the statute, not on the question whether Section 504 requires affirmative efforts on behalf of the handicapped by recipients of federal financial assistance. The latter point was simply assumed by committee members and witnesses alike. The floor debates and com-

mittee reports on the 1978 amendments also reflect Congress' understanding that Section 504 does obligate fund recipients to make feasible modifications in their programs to accommodate handicapped persons. The amendments themselves confirm this view. The new Section 305(a)(2) of the Act authorizes grants to states for the purpose of providing aid to public and private nonprofit entities seeking to comply with Section 504. One form of assistance specifically mentioned in the statute is the provision of interpreters for the deaf.

II

The district court decided this case before HEW issued its regulations implementing Section 504. As a consequence, the court did not address the critical questions that must be answered in resolving respondent's statutory claim. The court assumed that Section 504 protects only those handicapped persons who can fully participate in existing programs, without adjustments in program requirements and without the provision of auxiliary aids. The court therefore did not consider whether the clinical portions of petitioner's nursing program can be modified to permit respondent to participate or whether respondent could function adequately in a clinical setting with educational aids, such as interpreter services. Accordingly, the court of appeals correctly remanded the case to the district court for reconsideration in light of the applicable regulations.

The court of appeals erroneously suggested that petitioner must reconsider respondent's application

without regard for her hearing disability. Such a procedure is not required either by Section 504 or by the HEW regulations. A recipient of federal funds need not ignore an applicant's handicap; it must only make efforts, where feasible, to adjust its programs and provide the educational assistance necessary to permit qualified handicapped persons to participate. The Court should clarify this aspect of the court of appeals' instructions to the district court on remand.

III

A. This Court need not now decide whether Section 504 implicitly creates a private right of action to enforce the statutory prohibition against discrimination on the basis of handicap in federally funded programs. Petitioner is a public educational institution and therefore the alleged discrimination in this case occurred under color of state law. Accordingly, respondent may sue under 42 U.S.C. 1983 to enforce the provisions of Section 504, whether or not the latter statute itself gives rise to a private cause of action.

If the Court nonetheless decides to address the third question presented by petitioner, it should hold that Section 504 does impliedly authorize enforcement through private litigation. In this regard, we rely primarily on the arguments made in the briefs for the federal respondents in *Cannon* v. *University of Chicago*, No. 77-J26. The Senate report accompanying the 1974 amendments to the Rehabilitation Act expressly notes that Congress intended to "permit a judicial remedy through a private action" un-

der Section 504. Congressional action on the 1978 amendments to the Act offers additional support for this proposition. The amendments provide for an award of attorney's fees to private parties who prevail in enforcement suits under Title V of the Act. The Senate committee report on the amendments specifies Section 504 as one of the provisions that may be enforced through private litigation. The floor debates on the recent amendments, testimony at the 1977 House hearings on the implementation of Section 504, and the weight of judicial authority in cases arising under the Rehabilitation Act all serve to reinforce the conclusion that Section 504 does permit private suits by the victims of alleged discrimination against the handicapped.

B. Petitioners contend that respondent's suit is premature because she has not availed herself of the administrative grievance procedure set forth in the HEW regulations. This argument is insubstantial because no such procedure was available at the time respondent filed her complaint in the district court. Furthermore, neither the district court nor the court of appeals has ruled on the exhaustion question pressed by petitioner, and accordingly there is no decision on the matter now before this Court for review.

In any event, a person aggrieved by alleged discrimination in violation of Section 504 is not required to seek administrative relief as a precondition to private litigation. No exhaustion requirement of this kind exists, because individual victims of discrimination against the handicapped have no administrative remedies to exhaust. The complaint procedure established in the HEW regulations is an adjunct to the fund termination mechanism that Congress initially created for the enforcement of Title VI of the Civil Rights Act of 1964. The filing of an administrative complaint in accordance with the regulations initiates an investigation to which the complainant is not a party and which is not designed to grant him appropriate relief. Congress has not stated that resort to this procedure is a prerequisite for a private suit under Section 504, and no such requirement is fairly implied.

ARGUMENT

I. UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, A HANDICAPPED PERSON MAY BE EXCLUDED FROM A FEDERALLY FUNDED POSTSECONDARY EDUCATION PROGRAM ONLY IF HE DOES NOT MEET ESSENTIAL REQUIREMENTS FOR ADMISSION TO OR PARTICIPATION IN THE PROGRAM AND COULD NOT DO SO EVEN AFTER FEASIBLE PROGRAM MODIFICATIONS AND EVEN WITH THE USE OF AVAILABLE EDUCATIONAL AIDS.

A. Introduction: The 1973 Act

This case presents a difficult question of statutory interpretation under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* That statute, like earlier legislative efforts to aid the handicapped,[2] focuses pri-

[2] In 1920, Congress enacted the Smith-Fess Act, 41 Stat. 735, which established a program of federal grants-in-aid to state agencies providing training, counseling, and placement services for the physically handicapped. Since 1920 Congress

marily on the provision of federal financial assistance for vocational rehabilitation programs.[3] Congress

has repeatedly expanded the scope of this program with regard to both the kinds of services rendered and the kinds of handicaps treated. For example, in 1943, medical and surgical procedures were added to the rehabilitation program. See 57 Stat. 374. Eleven years later Congress authorized rehabilitation research and demonstration projects, substantially increased federal funding of state rehabilitation programs, and through matching grants encouraged state agencies to extend the coverage of their programs. 68 Stat. 652. Further significant expansions of the federal commitment to state rehabilitation programs occurred in 1965, 1967, and 1968. See 79 Stat. 286, 408; 79 Stat. 1282; 81 Stat. 250; 82 Stat. 297. A more detailed description of the development of federal legislation aiding the handicapped is set forth in S. Rep. No. 93-318, 93d Cong., 1st Sess. 8-11 (1973).

[3] Section 3 of the Rehabilitation Act of 1973 creates a Rehabilitation Services Administration to implement the various programs for the handicapped established by Congress. 29 U.S.C. 702. These programs include a large program of federal grants to state vocational rehabilitation agencies (Title I, 29 U.S.C. 720-750), a research and training program to provide more and better-trained rehabilitation personnel (Title II, 29 U.S.C. 760-764), and a number of other federal grant programs to assist the construction of rehabilitation facilities, to provide mortgage insurance for such facilities, and to finance certain special projects for agricultural workers and persons with certain specified kinds of handicaps (Title III, 29 U.S.C. 770-776). In particular, Congress established a National Center for Deaf-Blind Youths and Adults, 29 U.S.C. 774(b), 775, and authorized appropriations for special projects and demonstrations concerning rehabilitation of the deaf. See S. Rep. No. 93-318, 93d Cong., 1st Sess. 37-38, 39-40 (1973). Finally, Title IV of the Act instructs the Secretary of Health, Education, and Welfare to develop and publish standards for evaluating the effectiveness of state rehabilitation programs, to apply those standards in investigating such programs in cooperation with other federal agencies, and to render technical assistance to appropriate state agencies. 29 U.S.C. 780-782. Title IV also imposes on the Secretary a duty to render regular reports to Congress and the President concerning rehabilitation programs. See 29 U.S.C. 781(d), 784-787.

took an important additional step, however, in Title V of the 1973 Act, which includes a series of measures intended to promote the participation of handicapped persons in existing employment and educational programs not specially designed for the handicapped.[4] The correct construction of one of these provisions, Section 504 of the Act, 29 U.S.C. 794, is the central concern of this case.

Section 504 prohibits discrimination against "otherwise qualified handicapped individuals" in any program or activity receiving federal financial assistance. The statute provides in pertinent part:

> No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from participation in, be denied the

[4] Section 501(b) of the Act directs all federal agencies to develop "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals * * *" 29 U.S.C. 791(b). Section 501(c) encourages state agencies to do likewise. 29 U.S.C. 791(c). Similarly, Section 503(a) obligates federal contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals." 29 U.S.C. 793(a). Section 501(a) establishes an Interagency Committee on Handicapped Employees to review the hiring, placement, and advancement of handicapped persons by federal agencies (29 U.S.C. 791(a)), and Section 502 creates an Architectural and Transportation Barriers Compliance Board to promote the elimination of physical barriers that restrict the mobility of and opportunities available to handicapped persons (29 U.S.C. 792).

> benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The language of Section 504 is thus similar to that contained in other statutory provisions prohibiting different kinds of discrimination in federally funded programs. See, *e.g.*, Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d (no discrimination on the basis of race, color, or national origin); Section 901 of the Education Amendments of 1972, 20 U.S.C. 1681 (no discrimination on the basis of sex in many federally funded education programs). Despite this apparent similarity, however, Section 504 poses unique problems of interpretation and application, because the basis for discrimination that the statute makes impermissible is, at least in some circumstances, a physical characteristic that limits a person's ability to participate in existing programs.

Personal characteristics such as race and sex ordinarily do not affect a person's ability to perform certain tasks or to complete certain training. Congress' decision to prohibit racial, ethnic, and sexual discrimination in federally funded programs was intended to guarantee that no person, and in particular no woman and no member of a racial or ethnic minority, would be denied the benefits of federal funds on the basis of physical factors unrelated to that person's ability to participate in a given program.

The motivation for Section 504 was a bit different. Congress was not so much concerned with arbitrary discrimination as it was with years of inattention to

the needs of the handicapped. The problem was not so much that handicapped persons were excluded from programs in which they could easily participate, but that educational curricula were developed and physical facilities designed and constructed without any effort to make them accessible to the handicapped. When Congress legislated to prevent the denial of benefits to "otherwise qualified handicapped individual[s] * * * solely by reason of [their] handicap," the discrimination that Congress sought to eliminate comprised not only the irrational exclusion of handicapped persons merely because of their physical disability, but also the failure by recipients of federal funds to reevaluate their existing educational or employment requirements and to make reasonable modifications to permit participation by the handicapped.

Of course, Congress recognized that certain handicapped persons may be unable successfully to pursue a given occupation or course of study; a blind person cannot drive a bus and a person confined to a wheelchair cannot participate in a training program for Olympic gymnasts. The critical consideration is whether a particular physical ability is a real prerequisite for effective participation in a given program or activity or whether that ability is only said to be necessary because a recipient of federal funds has not given adequate consideration to the ways in which stated requirements may be modified in order to permit participation by the handicapped.

Accordingly, it is a mistake to treat the problem of interpreting Section 504 as a choice between the "in

spite of" standard adopted by the district court and the "without regard to" standard endorsed by the court of appeals in the present case. On the one hand, Congress meant to do more than simply prohibit discrimination against handicapped persons who are fully able to participate in existing programs in spite of their handicaps, *i.e.*, without modification of program requirements or physical facilities and without special assistance. Congress was concerned in 1973, and especially when it amended the Rehabilitation Act in 1974 and 1978, that too frequently handicapped persons are excluded from participation in federally funded programs in which they could readily take part if more care and planning by fund recipients were directed toward that end. On the other hand, Congress did not mean to say that all employment and educational decisions in federally funded programs must be made without regard for a participant's or prospective participant's handicap. Persons whose physical disability prevents them from performing tasks essential to effective participation need not be evaluated wholly apart from their physical limitations.

As initially passed, Section 504 was a single sentence, unaccompanied by any explanation concerning the scope of its coverage or the method of its enforcement. The substantial difficulties that arise in interpreting and applying Section 504 are attributable to Congress' failure to specify what is meant by discrimination against an "otherwise qualified handicapped individual * * * solely by reason of his handi-

cap." In addition, the administrative fund termination mechanism provided in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 did not appear in Title V of the Rehabilitation Act. Congress simply enacted a provision prohibiting discrimination against the handicapped in federally funded programs; it did not describe the kinds of practices it wished to ban or the way in which victims of illegal discrimination could obtain relief.[5]

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[5] The Senate Report accompanying the 1973 Act merely noted that Section 504 "proclaim[s] a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." S. Rep. No. 93-318, 93d Cong., 1st Sess. 50 (1973). In another report issued the same day, the Senate Committee on Labor and Public Welfare recommended that a White House Conference on the Handicapped be called. S. Rep. No. 93-319, 93d Cong., 1st Sess. (1973). Describing the problems of the handicapped in general terms, this report stated (*id.* at 2-3) that handicapped persons are

> all too often excluded from schools and educational programs, barred from employment or * * * underemployed because of archaic attitudes toward the handicapped, denied access to transportation, buildings and housing because of architectural barriers and lack of planning, and * * * discriminated against by our public laws. * * * Too often our programing for, and thinking about, the handicapped fails because of lack of knowledge. Too often we find that we automatically make the assumption that nothing can be done.

See also *Rehabilitation Act of 1972: Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 537, 1346, 1348 (1972) (testimony to the effect that employers

B. The 1974 Amendments

The first clarification of legislative intent came one year later, when the 93d Congress in its 2d Session tried to eliminate some of the confusion that had been created in the 1973 version of the Rehabilitation Act. The Act had originally defined the term "handicapped individual" to include (87 Stat. 361)

> any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

This definition had the effect of restricting the compass of Section 504 to those handicapped persons in need of and able to benefit from vocational rehabilitation services. The 1974 amendments (29 U.S.C. 706(6)) abolished this limitation and provided that, for the purposes of Titles IV and V of the Act, a "handicapped individual" is any person who

> (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

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often impose excessively stringent physical requirements for prospective employees and thereby exclude handicapped persons, including deaf persons, who are in fact able to perform necessary job functions).

This revised definition was intended to make clear that Section 504 protects all handicapped persons and all persons regarded as handicapped, irrespective of their employment prospects or ability to benefit from rehabilitation services.[6]

The committee report accompanying the 1974 amendments makes two important points concerning Section 504. First, the report establishes that, in Congress' view, the statute imposes on recipients of federal funds an obligation to undertake affirmative efforts to involve handicapped persons in programs and activities supported by federal financial aid. Just as Section 503 of the Act, 29 U.S.C. 793, requires federal contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals * * *," Section 504 "is intended to include a requirement of affirmative action as well as a prohibition against discrimination."

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[6] The pertinent portion of the Senate report accompanying the 1974 amendments explained that (S. Rep. No. 93-1297, 93d Cong., 2d Sess. 37-38 (1974)):

> a test of discrimination against a handicapped individual under section 504 should not be couched either in terms of whether such individual's disability is a handicap to employment, or whether such individual can reasonably be expected to benefit, in terms of employment, from vocational rehabilitation services. Such a test is irrelevant to the many forms of potential discrimination covered by section 504.
>
> Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs.

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39 (1974). This legislative history is highly persuasive with respect to the meaning of Section 504 as originally enacted. The committee report accompanying the 1974 amendments comes from the very same committee and the very same Congress that considered and passed the 1973 Act a year earlier. The committee's comment therefore shows that the Congress that adopted Section 504 did not intend that provision merely to prohibit discrimination against persons who, in spite of their handicaps, are capable of participating in existing programs; rather, Congress contemplated that recipients of federal funds would be required to take affirmative steps to ensure that the benefits of federal funding are available to handicapped persons who, with reasonable accommodation and assistance, can meet essential program requirements.[7]

[7] In June 1974, acting in accordance with Exec. Order No. 11758, 39 Fed. Reg. 2075 (1974), the Department of Labor issued regulations implementing the affirmative action requirements for government contractors contained in Section 503 of the Rehabilitation Act. 39 Fed. Reg. 20566 (1974). (The regulations are now codified at 41 C.F.R. Part 60-741.) In explaining these regulations to the Senate Committee considering the 1974 amendments to the act, the Secretary of Labor wrote (S. Rep. No. 93-1297, *supra*, at 106):

> It should be noted that the Regulations have broadened the minimum scope of affirmative action by incorporating the accommodation obligation as one aspect of that action. The accommodation obligation may involve providing access to the workplace, the job site, or to supplies. It may involve the redesign or restructuring of jobs or the modification or acquisition of equipment or special devices. The requirements of a particular business may negate job restructuring, as may the financial costs involved, or seniority and tenure arrangements may require protracted negotiations and compromises to avoid personnel problems. In each case, however, the actual facts and circumstances must be considered from the standpoint of what is reasonable.

The second significant aspect of the committee report on the 1974 amendments is its plain declaration

In addition, several years before Congress considered the Rehabilitation Act and the 1974 amendments, HEW had issued guidelines governing the enforcement of Title VI of the Civil Rights Act of 1964. 35 Fed. Reg. 11595 (1970). Those guidelines required school districts receiving federal financial assistance to modify their academic programs to ensure that "national origin-minority group children" were not excluded from effective participation in educational programs because of an "inability to speak and understand the English language." A failure to make such modifications where necessary, the guidelines stated, is discrimination on the basis of national origin, in violation of Section 601 of the Act. HEW took this position even though the language of Section 601 does not explicitly refer to the need for affirmative measures to avoid discrimination. This administrative construction of Section 601, requiring affirmative steps to accommodate persons of limited language ability, was sustained by this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974), a case decided only ten months before enactment of the 1974 amendments to the Rehabilitation Act.

When this background is considered in conjunction with the Senate Committee's express statement that the antidiscrimination provision in Section 504 "is intended to include a requirement of affirmative action," the conclusion that Congress envisioned the modification of academic programs and physical facilities to accommodate the handicapped is inescapable. The 1974 committee report shows (S. Rep. No. 93-1297, *supra*, at 39-40) that Congress was mindful of enforcement efforts under Section 601 of the Civil Rights Act and Section 503 of the Rehabilitation Act and expected enforcement of Section 504 to follow the pattern of requiring recipients of federal funds to undertake affirmative measures in aid of persons protected by the statute.

that Congress expected HEW and other federal agencies to promulgate regulations governing the implementation and enforcement of Section 504. The report states (S. Rep. No. 93-1297, *supra*, at 39-40):

> Section 504 * * * constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.
>
> The language of section 504, in follow[i]ng [Section 601 of the Civil Rights Act and Section 901 of the Education Amendments], further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. * * * This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

> It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504. The conferees fully expect that H.E.W.'s section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago—September 26, 1973.

The regulations involved in the present case are thus not the product of an executive agency's independent impulse, but rather are a direct response to the expressed will of Congress. Unfortunately, however, the regulations were not promulgated in accordance with the timetable set by the Senate Committee on Labor and Public Welfare. Although the Committee's report was issued and the 1974 amendments passed on November 26, 1974, HEW's final regulations were

not promulgated until April 28, 1977,[8] one year after President Ford formally ordered the Secretary of HEW to perform the tasks described earlier in the committee report.[9] See Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976).

C. The HEW Regulations

The regulations begin with a series of definitions. After repeating the statutory definition of "handicapped persons" within the meaning of Title V (compare 29 U.S.C. 706(6) with 45 C.F.R. 84.3(j)(1)), the regulations proceed to define and explain some of the phrases used in the statutory provision, *e.g.*, "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having such an impairment." See 45 C.F.R. 84.3(j)(2)(i)-(iv). The regulations then state what is meant by the term "qualified handicapped person." In the context of postsecondary and vocational education services, a qualified handicapped person is one "who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 45

[8] In January 1978, HEW promulgated an additional set of regulations governing the implementation and enforcement of Section 504 by other federal agencies. See 45 C.F.R. Part 85. The substantive provisions of these regulations parallel those set forth in the 1977 regulations. See pages 38-44 *infra*.

[9] In July 1976, in a suit brought by a handicapped rights organization, a federal district court ordered the Secretary of HEW to issue final regulations under Section 504 without "further unreasonable delays." *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976).

C.F.R. 84.3(k)(3). The comments accompanying this regulation state that HEW defines "technical standards" as "all nonacademic admissions criteria that are essential to participation in the program in question." 45 C.F.R. Part 84, Appendix A at 405.

Following the definitions in Section 84.3, the regulations elaborate in general terms on the antidiscrimination provision in Section 504 of the Rehabilitation Act. 45 C.F.R. 84.4(a) restates the statutory prohibition in nearly identical language and Section 84.4(b)(1) catalogues a number of illegal discriminatory actions. Section 84.4(b)(2) stresses that the Rehabilitation Act provision is concerned with equal opportunity, not equal results or achievement. A recipient of federal funds is not required to ensure that a handicapped person reaches the same level of proficiency as a nonhandicapped person in the same program; only an opportunity to do so must be provided. Finally, Section 84.10, the last section in the regulations' introductory subpart, states that the obligation of federal fund recipients not to discriminate in violation of Section 504

> is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.[10]

[10] This language is found in Section 84.10(a). Section 84.10(b) provides that the obligation not to discriminate "is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons."

The comments to Section 84.10 state that the provision "applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap." 45 C.F.R. Part 84, Appendix A at 408.

Subpart E of the regulations, 45 C.F.R. 84.41-84.47, contains provisions specifically applicable to postsecondary education. Several of these are especially relevant to the present case. First, Section 84.42(b)(2) states that in administering its admission policies, a recipient of federal funds may not use any test or criterion that has a disproportionate effect on the handicapped, unless the test "has been validated as a predictor of success in the education program or activity in question," and the Director of HEW's Office of Civil Rights has not shown that alternate tests or criteria, having a less adverse effect on the handicapped, are available. In particular, Section 84.42(b)(4) provides that, except in connection with affirmative or remedial action programs, a recipient may not inquire, as part of its admissions procedure, whether an applicant is a handicapped person.

If the proper application of HEW's regulations to the present case is to be understood, it is critical that Sections 84.42(b)(2) and 84.42(b)(4) be read in conjunction with the definition of a "qualified handicapped person" in Section 84.3(k)(3). In order to satisfy the latter definition, an applicant must demonstrate that he meets "all nonacademic admissions criteria that are essential to participation in the program in question." 45 C.F.R. Part 84, Appendix

A at 405. Thus, if the ability to perform a particular physical task or function is an essential requirement for participation in a particular program, the recipient of funds may inquire whether an applicant can fulfill that requirement. Such an inquiry may have a disproportionate effect on the handicapped, but if the task is indeed essential to success in the program, then the validation requirement of Section 84.42(b)(2) will be satisfied. Moreover, if applications for admission concentrate on the applicant's ability to perform essential functions, there will be no need to ask the more general questions that would violate Section 84.42(b)(4), *e.g.*, whether the applicant is a handicapped person or whether his sensory, manual, and locomotive abilities are normal. The purpose of the regulations is to preclude this kind of routine question concerning an applicant's handicapped status, and that purpose is not offended by more carefully drawn inquiries that focus on the ability to perform essential tasks.

The final provision in the HEW regulations that deserves attention here is 45 C.F.R. 84.44, dealing with "academic adjustments" to assist handicapped students. Section 84.44(a) states that fund recipients must modify their academic requirements "to ensure that such requirements do not discriminate, or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." In the very next sentence, however, the regulation reiterates the point that can also be derived from Section 84.3(k)(3)'s definition of "qualified handicapped person" and the accompanying comment (see pages 38-39, *supra*): Academic require-

ments need not be modified if they are essential to a particular program of instruction or to a directly related licensing requirement.[11] Thus, a handicapped person is not qualified under HEW's regulations unless he can meet all academic and nonacademic admissions criteria that are essential to the program in question. And, no modification or accommodation need be made where particular academic requirements are shown to be essential to the program of instruction or to a directly related licensing requirement.[12]

[11] The second sentence of Section 84.44(a) states:

> Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.

[12] Section 84.10(a) of the regulations (page 39, *supra*) provides that recipients may not justify their discrimination by reference to state or local law that imposes prohibitions on the basis of handicap. But, as Section 84.44(a) makes clear, the regulations do not preclude recipients from tailoring their academic requirements to take account of legitimate licensing standards directly related to a particular course of study. For example, Section 84.44(a) would permit a school for drivers' education instructors to design its curriculum in accordance with a local licensing requirement that the training of such instructors include at least 30 hours of supervised over-the-road operation of a motor vehicle. A course of study formulated to prepare the school's graduates to meet such a licensing requirement would inevitably exclude blind students, because the operation of a motor vehicle would be an essential part of the training program that could not be modified and that a blind person could not complete even with auxiliary educational aids. (Even without the licensing requirement, of course, the school almost certainly would decide that some period of actual driving under supervision is an indispensable part of the education program in question.)

The purpose of Section 84.44(a) is simply to guarantee that handicapped persons are not excluded from participation in federally funded programs because of a refusal to make reasonable adjustments in nonessential aspects of an academic curriculum. The examples provided in the regulation are instructive.

> Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.[13]

Section 84.44(d) deals with "auxiliary aids." The regulation provides that recipients of funds must take necessary steps to ensure that handicapped students are not excluded from education programs "because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking

[13] The comments accompanying Section 84.44(a) elaborate further (45 C.F.R. Part 84, Appendix at 417):

> This requirement * * * does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

skills." Such aids may include "taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments * * *." [14] Of course, in given situations, such aids may be inadequate to enable a handicapped person to participate effectively in an essential part of a course of study that cannot be modified to offer greater access. In such a situation, neither Section 84.44(d) nor any other provision in HEW's regulations prevents a recipient from denying the handicapped person admission to the program in question.

D. The 1978 Amendments

Petitioner does not contend that the regulations outlined above are inconsistent with Section 504 (see Pet. Br. 30-41, 47-56). Rather, petitioner argues that

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[14] To avoid misunderstanding, Section 84.44(d)(2) explicitly states that "[r]ecipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."

The comments to Section 84.44(d) explain that recipients can usually meet the obligation to provide auxiliary aids "by assisting students in using existing resources * * * such as state vocational rehabilitation agencies and private charitable organizations." 45 C.F.R. Part 84, Appendix A at 417. HEW anticipates that "the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities." *Ibid.*; see note 19, *infra* for a description of the additional federal grants provided in the 1978 amendments to the Rehabilitation Act in order to support the development and increased availability of auxiliary aids for the deaf; see also Section 101(a) of the amendments, 92 Stat. 2955, authorizing an increased appropriation of $48,000,000 for Title I's basic vocational grant program, thus raising the authorization for the fiscal year ending September 30, 1979, to $808,000,000.

the district court's decision, although rendered before issuance of the HEW regulations, adheres fully to the agency's interpretation of Section 504 and that therefore the remand ordered by the court of appeals is unnecessary. We respond to that contention in the following section (see pages 55-67, *infra*). First, however, we answer the argument of 32 states as amici curiae in support of petitioner to the effect that the regulations do not comport with the congressional intent underlying Section 504 (see Br. for the Commonwealth of Massachusetts, et al. 13-22).

As we have already emphasized (see pages 36-37, *supra*), the committee report accompanying the 1974 amendments to the Rehabilitation Act leaves little doubt that Congress wanted and expected the Secretary of HEW to issue regulations implementing Section 504 and providing guidance for recipients' affirmative efforts on behalf of the handicapped. See also H.R. Rep. No. 94-721, 94th Cong., 1st Sess. 4 (1975) (report accompanying fund authorizations in Rehabilitation Act Extension of 1976, Pub. L. No. 94-230, 90 Stat. 211). Any lingering uncertainty over whether Congress approves the requirement that recipients of federal funds must modify their programs where feasible to permit participation by the handicapped was eliminated by the passage and legislative history of the 1978 amendments to the Rehabilitation Act, 92 Stat. 2955.

In January 1977, before signing the regulations implementing Section 504, Secretary Mathews sub-

mitted them to Congress for its review. In his cover letter, the Secretary stated:

> I believe that the Executive and Legislative branches should work together so that it cannot be said that the Executive Branch has pursued policy beyond or in contradiction to what Congress authorized. A way to prevent any such confusion is for the Department, where the intent of the statute is unclear, to lay its interpretation of the statute before the Congress so that it can provide whatever clarification is appropriate.

Implemention of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 73 (1977) (hereinafter cited as *Implementation Hearings*). Likewise, in April 1977, when Secretary Califano issued the long-awaited regulations, he transmitted a copy to each Member of Congress and attached a cover letter stating (*id.* at 76):

> This regulation is strong. In many cases it calls for dramatic changes in the actions and attitudes of institutions and individuals who are recipients of HEW funds * * *.
>
> In light of the limited legislative history, I think it especially important that Congress evaluate the regulation, and the implementation process, to ensure that they conform to the will of Congress.

Congress entered no objection in response to the submission by either Secretary.[15]

On the contrary, a variety of legislative materials demonstrates that the 95th Congress knew of the administrative construction of Section 504, assumed that compliance with Section 504 would entail an indeterminate, although probably substantial, expense for structural and programmatic modifications, and perceived no inconsistency between the newly promulgated regulations and the intent of the Congress that initially passed the Rehabilitation Act.

In September 1977, the Subcommittee on Select Education of the House Committee on Education and Labor held hearings concerning the implementation of Section 504. HEW's regulations had been issued only a few months before, and the testimony at the hearings focused on the obligation of federal fund recipients to undertake affirmative efforts to help handicapped persons participate in funded programs and activities.[16] See, *e.g.*, *Implementation Hearings*,

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[15] In the 1978 amendments, Congress added a statutory requirement that regulations under Section 504 be submitted to the appropriate authorizing committee in each House at least 30 days before they are to become effective. See Section 119(2) of the 1978 amendments, 92 Stat. 2982. See also H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 92-93 (1978).

[16] At hearings held two months earlier in the Senate on a bill to extend the effectiveness of certain programs established in the Rehabilitation Act, Senator Dole referred favorably to the newly promulgated regulations under Section 504. See *Rehabilitation Extension Amendments of 1977: Hearings on S. 1712 and S. 1596 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 726-727 (1977).

supra, at 2-3, 11-15, 31-42, 43-45, 182-183, 199-216, 246-250, 253-257, 272-275, 358-360. No one suggested that Congress did not intend to impose such an obligation when it enacted Section 504.[17] Indeed, Representative Brademas, Chairman of the Subcommittee, began the hearings by declaring (*id.* at 1; see also *id.* at 289):

> With the publication of the regulations for section 504, disabled people can look forward to their rightful opportunity for full participation in our society.
>
> Central to the implementation of these regulations must be the realization that what handicapped people want is access to programs. Inevitably, enforcement of and compliance with Section 504 will cause some readjustment problems. Costs may be incurred and modifications might be required.

The ensuing testimony concentrated primarily on the likely costs of the modifications required by Section 504 and its accompanying regulations and on the federal government's responsibility *vel non* to bear some or all of those costs. There was no dispute over whether Section 504 requires *some* modifications. That the statute does have such an effect was simply assumed by committee members and witnesses alike.

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[17] In his prepared statement, David Tatel, Director of HEW's Office for Civil Rights, summarized the content of the new regulations and specifically mentioned that the regulations require postsecondary educational institutions to make "reasonable modifications in academic requirements, where necessary, to insure full educational opportunity for handicapped students." *Id.* at 296.

The floor debates in the House and Senate on the Rehabilitation Amendments of 1978 likewise manifested general acceptance of HEW's regulations and the obligation of fund recipients to accommodate handicapped persons where feasible by modifying program requirements and physical facilities. For example, Representative Jeffords, a member of the House Subcommittee on Select Education and a House conferee on the 1978 legislation, stated (124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978)):

> As a result of section 504 it has become clear to many that 504 means more than just removing architectural barriers for the physically handicapped. While this is certainly a priority goal, there are many other types of disabilities to which 504 applies and to which attention must be paid. People who are deaf face communication barriers which are just as great as the architectural barriers faced by those in wheelchairs. People who are blind face problems not encountered by either group and so some of the provisions that I helped develop were addressed specifically to these groups. One of the biggest problems facing the deaf throughout the country is the lack of interpreters to allow them to function within a hearing society. Not only are there not enough interpreters, there are specifically not enough trained interpreters. The provision in this conference report will establish 12 interpreter-training centers and interpreter pools within each State and help to alleviate these problems and make section 504's nondiscrimination policies meaningful as well as applicable to them.

See also *id.* at H13474-H13475 (remarks of Rep. Sarasin); *id.* at S18997 (remarks of Sen. Randolph); 124 Cong. Rec. H3974 (daily ed. May 16, 1978) (remarks of Rep. Dodd); *id.* at H3969 (remarks of Rep. Jeffords); 124 Cong. Rec. S15548 (daily ed. Sept. 20, 1978) (remarks of Sen. Randolph) ("if reasonable accommodations can be made to an individual's handicap, the goal of a productive life can be achieved by handicapped Americans").

The committee reports as well support the proposition that Congress viewed the HEW regulations as an appropriate interpretation and application of Section 504. The report of the Senate Committee on Human Resources is particularly instructive. The Committee noted that "a great deal of progress has been made in the legal rights area with the enactment of section 504 of the Rehabilitation Act of 1973 and other laws affecting the handicapped regarding affirmative action in employment and accessibility to programs and activities and buildings." S. Rep. No. 95-890, 95th Cong., 2d Sess. 36 (1978). See also *id.* at 18, 19, 55 (referring without objection to the enforcement of the regulations promulgated under Section 504); H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 34 (1978) (referring to the September 1977 implementation hearings and the "widely varying estimates of the costs of converting facilities to comply with the regulations implementing section 504").

In a discussion of the 1978 amendment expanding the responsibilities of the Architectural and Transportation Barriers Compliance Board created by Section 502 of the Act, the Senate Committee provided further evidence of its approval of the HEW regulations and its understanding that Section 504 was intended to require affirmative efforts to modify programs and physical structures to facilitate participation by handicapped persons in federally funded activities. Observing that the amendments authorize the Board to offer technical assistance to any public or private entity interested in removing architectural and transportation barriers which impede the mobility of the handicapped (see 92 Stat. 2981), the Committee stressed (S. Rep. No. 95-890, *supra*, at 17) that the Board is authorized to render aid only in connection with physical barriers, and not with respect to nonstructural measures that may be employed to improve program accessibility under Section 504 and its accompanying regulations.[18] The plain

[18] The Committee stated:

> An important function in achieving the desired goals of section 504 of the Rehabilitation Act of 1973 is the creation of a barrier free environment for the handicapped members of our society. It should be noted that the committee, in authorizing this technical assistance capability for the Board, realizes that the Board's expertise lies only in the area of physical barriers to accessibility and it is this expertise that the committee wishes provided under this authority. It further noted that nothing in this section should be construed to mean that the Board can develop and provide technical assistance with regard to nonstructural methods of removing barriers which limit a handicapped person's access to programs. Nonstructural methods of removing or eliminating barriers

implication of the Committee's remarks is that the HEW regulations accord with the will of Congress by requiring a variety of affirmative steps to enable handicapped persons to participate in federally funded programs.

Just as the legislative background of the 1978 amendments evidences Congress' acceptance of the HEW regulations, the amendments themselves bear witness to the congressional conviction that recipients of federal funds must make needed programmatic and structural modifications in order to avoid discriminating against the handicapped in violation of Section 504. Section 120 of the amendments, 92 Stat. 2983-2984, added a new Section 507 to the Act (to be codified at 29 U.S.C. 794c), creating an Interagency Coordinating Council to promote the efficient "implementation and enforcement of the provisions of [Title V], *and the regulations prescribed thereunder*" (emphasis added). And, significantly, Section 115(a) of the amendments, 92 Stat. 2971, added a new Section 305 to the Act (to be codified at 29 U.S.C. 775), authorizing grants to states for the establishment and operation of comprehensive rehabilitation centers that "shall provide * * * to local governmental units and other public and private non-

include the reassignment of classes or other services to accessible buildings; assignment of aides; home visits; delivery of health, welfare, and other such services at alternate accessible sites; and other such methods short of physical alteration that are permitted in order to achieve program accessibility under section 504 regulations.

profit entities located in the area such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this Act, particularly the requirements of section 504." [19] Thus,

[19] In keeping with the clear indication in the new Section 305(a)(2) that compliance with Section 504 in some circumstances may require the provision of auxiliary aids for the handicapped and, in particular, interpreter services for the deaf, Congress took a number of steps in the 1978 amendments to improve the availability of such services and to provide additional financial support for research and development activities in connection with other auxiliary aids for the deaf and other handicapped persons. For example, Section 114(3) of the amendments, 92 Stat. 2970-2971, adds a new Section 304(d) to the Act (to be codified at 29 U.S.C. 774(d)), authorizing grants to assist public or private nonprofit organizations in establishing or operating 12 programs "[f]or the purpose of training a sufficient number of interpreters to meet the communications needs of deaf individuals." In addition, Section 116(2) of the amendments, 92 Stat. 2975-2976, adds new Sections 314 and 315 to the Act (to be codified at 29 U.S.C. 777d and 777e), authorizing the Commissioner of the Rehabilitation Services Administration to make grants for the purpose of "expand[ing] the quality and scope of reading services available to blind persons" and "establish[ing] within each State a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals." See also the new Section 103(b)(4) of the Act, 92 Stat. 2960 (providing that group vocational rehabilitation services may include "providing recorded material for the blind and captioned films or video cassettes for the deaf"); and the new Section 204(b)(10) of the Act, 92 Stat. 2967 (authorizing the Secretary of HEW to make grants for the purpose of conducting "a model research and demonstration project designed to assess the feasi-

the very language of the amended Act supports the conclusion that compliance with Section 504 requires program modifications to accommodate the handicapped and the provision of available educational aids to assist handicapped persons in participating in federally funded activities. The 1978 amendments and their legislative history are invaluable aids in the interpretation of Section 504, and it is especially noteworthy that nothing in the amendments or related materials reflects any congressional dissatisfaction with HEW's administrative construction of the anti-discrimination provision—a construction of which Congress was well informed. As this Court has said in a different statutory context,

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bility of establishing a center for producing and distributing to deaf individuals captioned video cassettes providing a broad range of educational, cultural, scientific, and vocational programming.")

The legislative history of the 1978 amendments contains voluminous materials demonstrating Congress' awareness of and special concern for the needs of the deaf and persons with impaired hearing. See, in addition to the remarks of Representative Jeffords and Senator Randolph cited above (pages 49-50, *supra*), H.R. Rep. No. 95-1149, *supra*, at 12, 16, 17, 36, 38; S. Rep. No. 95-890, *supra*, 4, 21, 41-42, 45, 70-71; H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 76, 78, 81-82 (1978); *Implementation Hearings*, *supra*, at 34, 57, 59, 206, 244, 247, 278-279, 370-371, 447-455, 466-467; *Oversight Hearings on the Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 586-589, 594-595, 598-599 (1978); *Rehabilitation Amendments of 1978: Hearings on S. 2600 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 222-223, 506-554 (1978).

> [s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 380-382 (1969) (footnotes omitted).

II. THE COURT OF APPEALS CORRECTLY REMANDED THIS CASE TO THE DISTRICT COURT FOR RECONSIDERATION IN LIGHT OF THE REGULATIONS IMPLEMENTING SECTION 504.

No court has yet considered whether respondent can safely perform in petitioner's nursing program if feasible adjustments are made in the clinical portion of that program to accommodate her handicap. This case was tried and the district court's decision rendered before HEW issued its regulations for the implementation of Section 504. As a consequence, neither the district court nor the parties focused on the questions that must be addressed in order to resolve respondent's claims.

The district court held that Section 504 protects only those handicapped persons who are "able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are

suitable and available" (Pet. App. 20a). Under this construction, Section 504 prohibits discrimination against only those handicapped persons who can fully participate in a federally funded activity, given existing program requirements, training methods and physical facilities. The district court therefore was unimpressed by testimony from the former director of petitioner's nursing program (A. 53a) to the effect that, with appropriate supervision, respondent may be able to participate successfully in the clinical phases of the training curriculum. The court simply did not acknowledge that a recipient of federal funds may be required under Section 504 to adjust its requirements and to provide training aids and facilities not previously available in its program in order to afford handicapped persons an opportunity to participate.

The district court's narrow construction of Section 504 is inconsistent with the statute's legislative history and with the implementing regulations issued by HEW. The court of appeals correctly decided that the district court's application of Section 504 was erroneous and that under the statute petitioner might be required to modify its nursing program to accommodate respondent and other handicapped persons (Pet. App. 6a, 8a-10a).

The court of appeals also stated (Pet. App. 5a), however, that petitioner "must reconsider [respondent's] application for admission to the nursing program without regard to her hearing disability." This statement may mean that, in the court of appeals'

view, Section 504 precludes petitioner from considering the nature and extent of respondent's handicap in determining whether she is qualified to participate in the nursing program. If this reading of the opinion is accurate and the court of appeals believes that respondent's handicap must be treated as wholly irrelevant to petitioner's admission decision,[20] then

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[20] It is not clear that the panel's opinion must be so interpreted. The opinion could be construed to require petitioner first to determine whether respondent meets those admission standards unrelated to physical ability and then, if the decision is affirmative, to consider whether the program of instruction in nursing can be modified to permit respondent to participate safely. Such an approach would satisfy petitioner's obligations under the applicable regulations (see 45 C.F.R. 84.42(b)(4) and 84.44) and would ensure that evaluation of a handicapped applicant's academic qualifications is not subtly influenced by the fact that program adjustments might later be required. Of course, if program modifications and auxiliary aids prove insufficient to permit participation by a handicapped person whose non-physical abilities would qualify him for admission, the person need not be enrolled.

If this is the intended meaning of the court of appeals' opinion, then it is consistent with Section 504 and the governing regulations. The opinion still ignores, however, the possibility that a recipient of federal funds may wish to include as a "technical standard" for admission to a postsecondary education program (see 45 C.F.R. 84.3(k)(3) and 84.42(b)(2)) a requirement that an applicant be able to perform some physical task or function essential to participation in the program. If this is the way in which the recipient wishes to proceed and if the recipient demonstrates that the criterion is a valid predictor of success in the program (and the Director of HEW's Office for Civil Rights does not identify any alternate test with a less disproportionate adverse effect on the handicapped), then nothing in the Section 504 regulations prohibits the recipient from conducting its admissions

the ruling below misconstrues the requirements of Section 504 and the accompanying regulations; and this Court should clarify the court of appeals' instructions to the district court.

The critical inquiry is whether respondent's handicap prevents her from performing tasks essential to the nursing program, even after she has been provided with available auxiliary aids and feasible program modifications have been made. Section 504 does not require petitioner to ignore respondent's hearing problem; it does require petitioner to try to find a way for qualified handicapped persons to participate in its federally funded programs.

The record in this case does not establish whether the clinical portion of petitioner's Associate Degree program can be modified in order to permit respondent to participate in the essential aspects of nurses'

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program in this manner. The court of appeals' opinion is too restrictive to the extent it indicates that a recipient may not proceed in the way described here but may make admissions decisions only in the way described in the first paragraph of this note.

Whatever the deficiencies of the court of appeals' opinion, though, petitioner errs in asserting (Pet. Br. 41) that respondent "has been judicially declared 'otherwise qualified' to be admitted" to the Associate Degree Nursing Program. The court of appeals carefully noted that it was not expressing any opinion on respondent's academic and nonacademic qualifications (see Pet. App. 5a & n.5) or on whether petitioner's program can be modified to accommodate a student with a hearing impairment like respondent's (see Pet. App. 8a & n.8). The question whether respondent is qualified to participate in the program if feasible adjustments are made and auxiliary aids are provided is precisely the question that the district court did not address initially and that must be answered on remand.

training. Petitioner characterizes respondent as a "seriously deaf person" (Pet. Br. 41), but the report of the audiologist at the Duke University Medical Center states that, with a proper hearing aid, respondent's hearing improves to a level at the outer limits of normal hearing (A. 125a, 127a-128a). The district court's finding of fact (Pet. App. 15a) follows the doctor's report. Because this case was tried before the issuance of HEW's regulations, neither party developed evidence concerning the possibility that respondent and other persons with similar hearing difficulties can fulfill the clinical requirements of petitioner's program through the use of interpreter services or other auxiliary educational aids. Similarly, the parties did not investigate the feasibility of adjusting the clinical requirements themselves to accommodate students with hearing handicaps no more severe than respondent's.

Petitioner argues (Pet. Br. 49-50) that the findings of the district court are sufficient to absolve the College of any charges of discrimination in violation of Section 504 and the HEW regulations. In particular, petitioner emphasizes the district court's conclusion (Pet. App. 18a) that "it would be difficult and, in fact, dangerous for [respondent] to even attempt the clinical portion of the training program." But this statement, and the resulting legal ruling that respondent's rejection on the basis of her impaired hearing did not deprive her of her rights under Section 504, are both based on the erroneous assumption that petitioner is not obligated to identify and imple-

ment feasible program modifications that will *enable* handicapped persons to participate safely. The district court simply did not consider whether it is feasible to change the nursing program to accommodate respondent or to provide interpreter services during those portions of the clinical training for which respondent's hearing may be inadequate.

The record evidence relevant to these matters is sparse. The director of petitioner's nursing program at the time respondent sought admission testified that "[t]here is the possibility that [respondent] could [accomplish all of the skill levels in the clinical program] if she just had one person with her to completely supervise and make sure that she understood what was being said and what she was to do and that she understood her patient" (A. 53a). The same witness stated, however, that petitioner was not prepared to provide respondent with the supervision necessary to compensate for her handicap in the clinical program (*ibid.*). Other faculty members testified that it would be impossible for a person with a hearing impairment like respondent's "to meet the needs of patients in critical care areas" (A. 71a) or in noisy areas containing machinery and equipment (A. 96a). One of these witnesses expressed concern (A. 77a) that providing adequate supervision for respondent in the clinical program might entail prohibitive expense, but she did agree (A. 74a) that there are probably many areas in the field of nursing in which a person like respondent could function safely. Both the district court and the court of appeals acknowledged (Pet. App. 6a n.6, 20a) that respondent could perform satisfactorily as a registered nurse in a number of settings, "such as in industry or perhaps a physician's office."

All the testimony by petitioner's witnesses in the district court was colored by the communications between petitioner and the North Carolina Board of Nursing at the time respondent's application for the Associate Degree program was pending. Referring to letters received from the Executive Director of the State Board in response to inquiries by petitioner (see A. 132a-134a, 138a-139a), several witnesses stated that respondent was not admitted to the nursing program at least in part because, even if she were to complete her training successfully, she could not be licensed as a registered nurse in North Carolina (A. 45a, 70a-71a, 74a, 82a). A faculty member testified (A. 74a) that a nursing student

> must be recommended by the faculty saying that she is safe in all areas before she can take her state Board. * * * [W]e can't say that we are preparing [her] to function in one area, whether it be industrial nursing or some other area. We have to say that she is safe in every area when we recommend her to the Board, [and] that means the critical care areas, too.

The district court's findings of fact and conclusions of law stressed the significance of the letters received by petitioner from the State Board (Pet. App. 15a, 18a). The court stated that "the single major factor in [petitioner's] refusal to allow admissions to [re-

spondent] was her projected inability to be licensed as a Registered Nurse after graduation" (Pet. App. 18a).

Petitioner's asserted reliance on the State Board's licensing requirements as a justification for rejecting respondent's application is faulty for several reasons. First, the State requirements are by no means as clear as petitioner, the district court, and the State Board's Executive Director suggest. The Executive Director's first letter (A. 132a) stated that "[respondent's] hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, or by a license as LPN [*i.e.*, a licensed practical nurse]." But, of course, respondent *has* been licensed as a practical nurse for the last 12 years, and her license was renewed by the State Board and signed by the Board's Executive Director *after* all the events surrounding respondent's application for the Associate Degree program had occurred (A. 153a). Therefore, there is at least some question whether the Executive Director's discouraging letters to petitioner conform with the Board's own practice regarding respondent and other persons with impaired hearing.

Further suspicion concerning the authoritativeness of the Executive Director's letters arises from an examination of North Carolina law governing the practice of nursing. The relevant statutory provisions are contained in Article 9 of the Chapter entitled "Medicine and Allied Occupations," N.C. Gen. Stat. § 90-158 *et seq.* (1975 Repl.). Section 90-170 lists the qualifications required of an applicant for the

examination leading to certification and licensing as a registered nurse. The statute does not mention physical condition. An applicant must be a high school graduate of good moral character who has completed the course of study at and has graduated from an "educational unit in nursing" accredited by the State Board in accordance with the standards set forth in N.C. Gen. Stat. § 90-171.7 (1975 Repl.). Those standards impose no physical requirements for the students who may be educated in accredited nursing programs.[21] The only reference to physical ability in Article 9 is found in § 90-171.5(7) (1975 Repl.). That section provides that the Board may revoke or suspend any license to practice nursing or deny any application for such a license if the Board finds on the basis of competent evidence adduced at a hearing that the licensee or the applicant is "mentally or physically incompetent to practice nursing." "Physical incompetence" is not defined. The provision suggests that the Board considers physical disabilities only in the context of individual proceedings focusing

[21] The Standards for Educational Units in Nursing, promulgated by the North Carolina Board pursuant to its authority under Article 9, state only that "[c]riteria for screening applicants for admission to an educational unit must include assessment of: * * * Physical and emotional health which would indicate applicant's ability to provide safe nursing care to the public." The Board's Standards do not preclude the use of auxiliary educational aids by handicapped students, nor do they provide that every nursing student must be able to perform all the functions currently required in existing clinical programs. The requirement of general physical health should not be read to exclude all handicapped students whose nonphysical abilities would qualify them for admission to nursing programs.

on the qualifications of particular licensees whose fitness is for some reason questioned or particular applicants at the time they seek certification.

Moreover, the provisions in Article 9 that now govern the practice of nursing in North Carolina have been repealed, effective July 1, 1981. See 1977 N.C. Sess. Laws, ch. 712, § 3. The recent statute creates a Governmental Evaluation Commission to review all the programs and functions scheduled for termination under the act and to make recommendations to the General Assembly on whether the regulatory programs and agencies under review "should be terminated, reconstituted, reestablished, or continued, with or without modification of the relevant statutes." Thus, there is a substantial question whether the State Board of Nursing and its licensing requirements will continue to exist in their present form after July 1, 1981.[22] This uncertainty casts additional doubt on the legitimacy of petitioner's continued reliance on these requirements as a justification for excluding respondent from the nursing program.

It is noteworthy that, even after expressing all her misgivings concerning respondent's ability to perform satisfactorily in petitioner's clinical training

[22] Any revised State licensing requirements will presumably need to comply with N.C. Gen. Stat. § 168-6 (Michie 1976), which provides that "[h]andicapped persons shall be employed * * * in all * * * employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved." See *Burgess* v. *Joseph Schlitz Brewing Co.*, 250 S.E. 2d 687, 689 (N.C. App. 1979) ("the Legislature intended to grant broad protection of basic rights to all persons with any type of disability").

program and later as a registered nurse, the State Board's Executive Director still did not render an unequivocal opinion that respondent could not be licensed. After making the unsupported (and apparently unsupportable) assertion that

> one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse (or to licensed practical nurse where appropriate) includes evidence that an applicant has no limitations, physically, emotionally, or mentally, to prevent the applicant from practicing nursing, after licensure, without restriction of any kind on the license

(A. 138a-139a), the Executive Director concluded by saying that she could not "predict eligibility or ineligibility for the licensing examination should [respondent] enroll in, and be allowed to complete the program several years hence" (A. 139a). The Board's own refusal to provide a definitive answer to petitioner's inquiries undercuts the validity of petitioner's reliance on State licensing requirements as a reason for excluding respondent from the nursing program.

Petitioner's insistence (Pet. Br. 44) that there can be no "partially skilled RN professionals" and "no partial RN licenses" begs the question, "Why not?" Petitioner nowhere explains why "it is absolutely essential to the safety and well-being of patients that the RN professional and the RN trainee assigned to provide nursing care be physically able to cope with all kinds of patient needs and emergencies" (*ibid.*). One of petitioner's own witnesses testified (A. 74a) that respondent could probably function adequately in

many areas of nursing, and the Director of Nursing Service at Southeastern General Hospital identified a number of positions for which respondent could appropriately be hired when openings become available (A. 140a-141a, 144a-145a). The court of appeals correctly observed (Pet. App. 6a n.6) that "the question of 'limited' verses [sic] 'unlimited' certification of [respondent] as an RN" is not presented at this stage in the litigation, but the court did comment (*ibid.*) that "if [respondent] meets all the other criteria for admission in the pursuit of her RN career, * * * it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." Even if the State Board rejects the idea of a partial license, there is still the possibility that respondent may be able to obtain certification and employment in another state. The court of appeals therefore properly remarked that under Section 504 respondent should not be excluded from the nurses' training program solely because she may not be able to perform every conceivable task that a registered nurse may be required to perform.

In sum, the letters from the State Board's Executive Director do not justify petitioner's decision to reject respondent's application on the basis of her hearing impairment. The record in this case does not establish that respondent could not be licensed in North Carolina, but in any event, Section 504 requires that a recipient of federal funds consider an applicant's ability to participate in a postsecondary

education program independent of state and local laws that may impose per se prohibitions or limits on the eligibility of handicapped persons to practice a particular occupation or profession. See 45 C.F.R. 84.10(a). The focus must be on individual ability to perform particular functions or to complete prescribed training. Petitioner must determine whether the clinical portion of its training program can feasibly be modified to accommodate a student with a hearing problem like respondent's and whether such a student can feasibly be assisted in the nursing program through the use of auxiliary educational aids, such as interpreter services. The court of appeals properly remanded this case to the district court so that the requisite inquiry under Section 504 can be pursued.[23]

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[23] Petitioner cites (Pet. Br. 56) *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 72 (1977), for the proposition that the costs of modifying the nursing program to comply with Section 504 would impose an undue hardship. The citation is inapposite because, unlike the "reasonable accommodation" requirement under Title VII of the Civil Rights Act at issue in *Hardison*, the affirmative action requirement in Section 504 and the accompanying regulations is based on the general authority of the federal government to impose conditions on the use of federal funds by grant recipients. See *Lau* v. *Nichols*, *supra*, 414 U.S. at 569; *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947); *United States* v. *San Francisco*, 310 U.S. 16, 26 (1940). Section 504 applies only to those institutions that receive federal funds. Under its delegated power to spend for the general welfare, Congress may reasonably require recipients of federal tax dollars to spend money to comply with federal laws that protect the handicapped. Moreover, the accommodations required by the

III. RESPONDENT PROPERLY BROUGHT THIS SUIT TO VINDICATE HER RIGHTS UNDER SECTION 504 OF THE REHABILITATION ACT.

A. Respondent's Complaint States A Cause Of Action On Which Relief Can Be Granted

The third question presented in the petition for certiorari in this case is whether Section 504 creates a private right of action to enforce the statutory prohibition against discrimination on the basis of handicap in federally funded programs. The Court need not decide that question here because petitioner is a public educational institution and therefore the alleged discrimination of which respondent complains occurred under color of state law. Accordingly, respondent has stated a cause of action under 42 U.S.C. 1983 to redress an alleged deprivation, under color of state law, of the rights, privileges, and immunities secured by the laws of the United States (see A.

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court of appeals in *Hardison* were made necessary by the employee's voluntary religious choice; they would have impinged on his fellow employees and on a valid seniority system. 432 U.S. at 80-83. Respondent and other handicapped persons do not ordinarily choose to be disabled, and adjustment of petitioner's program to aid the handicapped would not implicate the Establishment Clause or impinge directly on any other student. Finally, petitioner presented no evidence in the district court to support its conclusory assertions that program modifications would be unreasonably costly, in light of the federal financial assistance received and other pertinent considerations (A. 77a). The district court made no findings on this issue. Accordingly, none of the considerations underlying this Court's decision in *Hardison* are present here.

5a).[24] This Court has acknowledged that Section 1983 may be invoked to vindicate federal statutory as well as constitutional rights (see, *e.g.*, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972)), and the district court in this case recognized that respondent's suit is properly viewed as an action under Section 1983 to enforce the antidiscrimination provision in Section 504 of the Rehabilitation Act.[25]

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[24] Respondent's initial complaint (A. 2a-8a) did not expressly allege a basis of federal jurisdiction applicable to this action. An amendment to the complaint (A. 9a) cited 28 U.S.C. 1337 as a possible jurisdictional base. A more appropriate citation would have been 28 U.S.C. 1343(4), which grants the federal district courts jurisdiction over civil suits "under any Act of Congress providing for the protection of civil rights * * *." Section 504 of the Rehabilitation Act is such a statute. As one Senator recently remarked in the course of floor debate on the 1978 amendments to the Act:

> [T]here is a great new civil rights struggle going on in our country. Long-neglected Americans are seeking, with good reason, their full and equal share of the rights to which all are entitled in our land. Accessibility for handicapped individuals must be viewed in that context—it is an issue of civil and human rights. I believe strongly that we must assure that the rights and opportunities accorded every other American are accorded to handicapped Americans.

124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). See also S. Rep. No. 95-890, *supra*, at 39.

[25] The court of appeals erroneously declared (Pet. App. 3a) that the district court's opinion includes an implicit finding that respondent "could pursue a private right of action under Section 504 * * *." This remark ignores the district court's careful description of the theory of respondent's lawsuit. The district court stated (Pet. App. 19a): "[Respondent] contends * * * that by violating [Section 504, petitioner] has denied her rights guaranteed under the 'law of the United

See Pet. App. 19a; A. 15a. See also *Cannon* v. *University of Chicago*, No. 77-926 (argued Jan. 9, 1979), Brief for the Federal Respondents 22-24 & n.16, 57.[26] This case therefore does not require the Court to decide whether Section 504 itself creates a private right of action. That question can best be resolved in a suit alleging that a private recipient of federal funds has discriminated against a handicapped applicant or prospective employee. See, *e.g.*, *Trageser* v. *Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), petition for cert. pending, No. 78-1454. Because the alleged discrimination in such a case would not occur under color of state law, the plaintiff could not state a cause of action under 42 U.S.C. 1983 and would need to rely directly on Section 504.

Should the Court nevertheless decide to address petitioner's third question in this case, it should hold that Section 504 does create an implied private right of action for the enforcement of the statutory prohibition against discrimination on the basis of handicap in federally funded programs. The arguments advanced by the federal respondents in *Cannon* in support of a private remedy under Section 901 of the Education Amendments of 1972, 20 U.S.C. 1681, are equally applicable here. Section 504 was consciously modeled on Section 901, and on Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Congress

States,' thus giving rise to a cause of action under 42 U.S.C. § 1983."

[26] Copies of the Brief and Reply Brief for the Federal Respondents in *Cannon* have been sent to petitioner's counsel.

expected the three statutes to be enforced similarly. See, *e.g.*, S. Rep. No. 93-1297, *supra*, at 39-40.

Indeed, in a significant way, the support in the legislative history for a private right of action under Section 504 is even stronger than it is for the availability of private suits under Section 901. The briefs for the federal respondents in *Cannon* make this point in some detail. See Br. 35-40; Reply Br. 14-15. The primary piece of evidence is the Senate committee report on the 1974 amendments to the Rehabilitation Act. That report, issued by the same Congress that enacted Section 504 in its 1st Session one year earlier, stated explicitly that proper implementation of the statute would "permit a judicial remedy through a private action." S. Rep. No. 93-1297, *supra*, at 40.[27] See also S. Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974). The report indicated that the same means of enforcement would also be available under Section 901 and Section 601. Whatever discount one must apply when using the 1974 report as an aid to the interpretation of the latter two statutes enacted by earlier Congresses,[28] the report's authoritativeness as far as Section 504 is concerned is indisputable.

The conclusion that Section 504 does create a private right of action is confirmed by the 1978 amendments to the Rehabilitation Act and the accompany-

[27] The relevant passages from the Senate report are reproduced at considerable length at pages 36-37, *supra*.

[28] Cf. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541-542 (1962) (plurality opinion); *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

ing legislative materials. The new Section 505(b) of the Act (to be codified at 29 U.S.C. 794a(b)), 92 Stat. 2983, authorizes the award of attorney's fees to parties other than the United States who prevail in suits to enforce the provisions of Title V, including Section 504.[29] The Senate committee report states:

> The committee believes that the rights extended to handicapped individuals under title V * * * are, and will remain, in need of constant vigilance by handicapped individuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

S. Rep. No. 95-890, *supra*, at 19.

The floor debate in the Senate also evidences Congress' intention to permit enforcement of Section 504 through private litigation. Senator Cranston stated that "an important reason for the inclusion of the attorneys' fees provision in [the 1978 amendments] is to encourage appropriate private litigants to bring actions under title V of the Rehabilitation Act." 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978). See also *ibid.* (remarks of Sen. Bayh); *id.* at S15590-S15591 (remarks of Sen. Cranston); 124 Cong. Rec.

[29] Section 505(b) provides that:

> In any action or proceeding to enforce or charge a violation of a provision of [Title V of the Rehabilitation Act], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

S18999-S19000 (daily ed. Oct. 14, 1978) (remarks of Sen. Stafford).[30]

Testimony during the House committee hearings on Section 504 shortly after issuance of the HEW regulations demonstrates that a private remedy is necessary if the statute is to provide an effective guarantee of rights for handicapped persons. David Tatel, Director of HEW's Office for Civil Rights, testified that

[30] Thirty-two states as amici curiae argue that the new Section 505(a)(2) of the Act, added by the 1978 amendments (92 Stat. 2983; to be codified at 29 U.S.C. 794a(a)(2)), reveals Congress' intention to preclude private suits under Section 504. Amici Br. for the Commonwealth of Massachusetts, *et al.* 23-27. This is incorrect. Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

This amendment merely codifies HEW's existing practice of enforcing Section 504 through administrative procedures identical to those employed under Section 601 of the Civil Rights Act. Congress always expected enforcement of Section 504 and Section 601 to be consistent (see S. Rep. No. 93-1297, *supra*, at 39-40), and in 1978, the legislators simply wrote this expectation into the statute. See S. Rep. No. 95-890, *supra*, at 19. In *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), four Justices acknowledged that Title VI of the Civil Rights Act can be enforced through a private action. See slip op. 12-14 (Stevens, J., concurring in the judgment in part and dissenting in part). Many lower federal courts have reached the same result. See cases cited in Brief for the Federal Respondents in *Cannon* 20. The new Section 505(a)(2) provides that Section 504 should be enforced by the same methods as Title VI, and those methods include private suits.

"the private right of action for individuals [should] be preserved[, because] HEW is not in a position and does not have the resources to do the whole job." *Implementation Hearings*, *supra*, at 358. A witness representing the Children's Defense Fund stated that private enforcement of Section 504 is important because "the legal power of [the Office for Civil Rights] and many of the other federal enforcement agencies is severely limited in terms of the kind of relief that can be ordered for individuals. OCR lacks legal authority to order the specific relief desired by a handicapped complainant. It can only use its sledgehammer to cut off all funds." *Id.* at 265-266. See also *id.* at 257-258, 366; Brief for the Federal Respondents in *Cannon* 49-51.

The weight of judicial authority favors an affirmative answer to the question whether Section 504 creates a private right of action. Last Term, this Court reviewed a decision in which a three-judge federal district court resolved a private suit on constitutional grounds and did not rule on appellees' claim under Section 504. The Court vacated the judgment below and remanded "with directions to decide the claim based on the federal statute, § 504 of the Rehabilitation Act of 1973 * * *." *Campbell* v. *Kruse*, 434 U.S. 808 (1977). This disposition implicitly recognized that a private action can be maintained under Title V. Several lower federal courts have explicitly reached the same conclusion. See *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th

Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir .1977);[31] *Vanko* v. *Finley*, 440 F. Supp. 656 (N.D. Ohio 1977); *Whitaker* v. *Board of Higher Education*, 461 F. Supp. 99 (E.D.N.Y. 1978); *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Bartels* v. *Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W.Va.). See also *Camenisch* v. *University of Texas*, No. A-78-CA-061 (W.D. Tex. May 17, 1978), appeal pending; *Crawford* v. *University of North Carolina*, 440 F. Supp. 1047 (M.D. N.C. 1977) (both ordering preliminary injunctive relief and then staying the actions pending administrative efforts to obtain compliance with Section 504). But see *Barnes* v. *Converse College*, Civ. No. 77-1116 (D.S.C. Mar. 31, 1978), appeal pending, No. 78-1440 (4th Cir.); *Doe* v. *New York University*, 442 F. Supp. 522 (S.D.N.Y. 1978) (both dismissing private

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[31] Like the private respondents in *Cannon*, petitioner here argues (Pet. Br. 56-59, 63-66) that the Seventh Circuit recognized a private right of action in *Lloyd* only because HEW had not yet issued regulations establishing an administrative mechanism for obtaining compliance with Section 504. With the issuance of the HEW regulations, petitioner contends, the rationale of *Lloyd* disappeared, and the case should no longer be cited in support of private suits under Section 504. Moreover, petitioner maintains, cases relying on *Lloyd* as authority for the enforcement of Section 504 through private litigation are now discredited and should not be followed. These arguments are answered in the briefs for the federal respondents in *Cannon* (Br. 38-40; Reply Br. 14-15), and we do not repeat that discussion here.

suits under Section 504 for failure to exhaust administrative remedies).[31a]

Many of the cases cited above involve local governments or other public institutions as defendants, and in those instances the plaintiffs' cause of action could have been based on 42 U.S.C. 1983 rather than directly on Section 504. This very fact provides additional impetus for the judicial recognition of a private right of action under Section 504. Congress did not envision different enforcement schemes for that statute depending on the public or private character of the recipients of federal aid. Section 504 was intended to prohibit discrimination against the handicapped in all federally funded programs, and if private suits to enforce this provision may be brought against public entities under Section 1983, there is no reason why they should not also be available to redress discrimination by private recipients of federal monies. See Brief for the Federal Respondents in *Cannon* 25-26.[32]

[31a] In July 1977, two and a half months after the issuance of HEW's regulations, the district court in *Barnes* entered a preliminary injunction directing the defendant college to provide interpreter services to assist plaintiff during her summer school classes. The court required plaintiff to post a security bond to guarantee that the college will be reimbursed for the cost of the interpreter if future litigation establishes that the college is not obligated to provide such services. See 436 F. Supp. 635 (D.S.C. 1977).

[32] Petitioner contends (Pet. Br. 61) that *Trageser* v. *Libbie Rehabilitation Center, supra*, 590 F.2d at 89, establishes that there can be no private right of action under Section 504 "unless a primary objective of the federal financial assistance [to the program involved] is to provide employment." This argument is based on a misreading of the court of appeals' opinion in *Trageser*. The case held only that Section 504 cannot support a private *employment* discrimination suit unless a principal purpose of the federal funding involved is to provide employment. The decision did not undercut the Fourth Circuit's finding of a private right of action in this case, because respondent did not sue to remedy employment discrimination. *Id.* at 90 n.12. We believe that *Trageser* was wrongly decided, but in any event it does not affect the outcome here.

B. Recourse to HEW's Administrative Complaint Procedure is Not a Prerequisite to a Private Suit Under Section 504

Petitioner contends (Pet. Br. 56-66) that respondent's suit should be dismissed because she has not filed an administrative complaint concerning petitioner's alleged discriminatory rejection of her application for the Associate Degree Nursing Program. The first response to this assertion is that, when respondent's suit was filed in September 1975, no administrative complaint procedure was available. The administrative enforcement mechanism for Section 504 was not established until April 1977, when HEW promulgated regulations making the enforcement procedures developed earlier under Title VI of the Civil Rights Act applicable to Section 504 as well. The district court dismissed respondent's action in December 1976, several months before she could conceivably have filed an administrative grievance. Because no administrative remedy of any kind was available at the time respondent sought judicial relief, petitioner's exhaustion argument raises a question that is not present in this case.

Moreover, neither the district court nor the court of appeals has rendered any decision on the exhaustion issue, and, accordingly, there is no ruling in that regard currently before this Court for review. The court of appeals suggested that the district court might "deem it advisable" to consider the doctrines of administrative exhaustion and primary jurisdiction on remand, but neither court has expressed any opinion on whether or how those legal constructs apply in the context of Section 504. The final question presented by petitioners therefore is not ripe for this Court's consideration.

If the Court reaches the issue, however, it should hold that a handicapped person who has suffered discrimination in violation of Section 504 need not file an administrative complaint before initiating legal action against the offending recipient of federal funds. The arguments made in this connection by the federal respondents in *Cannon* (see Br. 58-59 n.36; Reply Br. 4-6) are equally applicable here, because the HEW regulations governing Title IX of the Education Amendments and Title V of the Rehabilitation Act incorporate the same enforcement procedures, *viz.*, the ones first designed to implement Title VI of the Civil Rights Act. See 45 C.F.R. 84.61 and 86.71 (both incorporating 45 C.F.R. 80.6-80.10 and Part 81). The fund termination mechanism established in these regulations is not designed primarily to redress individual grievances of persons who have been subjected to illegal discrimination in programs receiving federal financial assistance. While it is true that such persons may trigger an administrative in-

vestigation by filing a complaint with the appropriate funding agency, they may not participate as parties in the investigation or in subsequent enforcement proceedings. A voluntary compliance agreement between the agency and the recipient of funds need not include relief for the specific benefit of the original complainant. In short, an exhaustion requirement is inappropriate under Title VI, Title IX, and Title V, because respondent and other persons similarly situated do not have any real administrative remedies to exhaust.

When the HEW regulations implementing Section 504 were considered at House hearings held in September 1977, witnesses gave conflicting testimony on the question whether Congress should require resort to the HEW complaint procedure as a precondition to private suit under Section 504. Compare *Implementation Hearings, supra*, at 208, 209 (remarks of witnesses Orleans and Peltason) (favoring enactment of a statutory exhaustion requirement), with *id.* at 266, 276 (remarks of witnesses Yohalem and Gashel) (opposing such a requirement). Having heard these disparate views, Congress did not include an exhaustion provision in the 1978 amendments to the Rehabilitation Act. This failure to respond to a clear invitation from proponents of the view espoused by petitioner is perhaps not by itself dispositive of the exhaustion question, but it surely offers no support for the proposition that an administrative grievance must be filed and resolved before Section 504 may be enforced through private litigation.

Finally, petitioner suggests (Pet. Br. 64-66) that this Court should apply the "doctrine of primary jurisdiction" and direct the district court to stay further proceedings until respondent has attempted to obtain voluntary compliance with Section 504 through HEW's administrative complaint procedure. But, as the federal respondents argued with respect to Title IX in *Cannon* (Br. 59-60 n.36; Reply Br. 6-9), there is no *a priori* reason for federal courts to defer to the special competence of an administrative agency when an antidiscrimination statute is at issue. Although the substantive regulations promulgated under Section 504 may be somewhat more intricate than their counterparts under Title VI and Title IX, federal courts are well suited for the adjudication of claims involving alleged deprivation of civil rights, and that fact is not changed because a particular statute is intended to protect persons whose unique problems have not previously commanded extensive legislative attention. If petitioner were correct, and federal courts were routinely required to delay proceedings in private suits until administrative investigations and compliance efforts could be completed, the major contribution that private litigation can make to the effective enforcement of Section 504 would be lost. Courts may await administrative action when, in an individual case, a proper need arises for the court to ascertain the views of the funding agency on the events in question. But there should be no general requirement that judicial proceedings be postponed until administrative action has been concluded.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the Court should clarify the court of appeals' instructions to the district court, in accordance with the views expressed herein.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

PETER BUSCEMI
ANDREW J. LEVANDER
Assistants to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
VINCENT F. O'ROURKE, JR.
STEPHEN L. MIKOCHIK
Attorneys

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IN THE

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OCTOBER TERM, 1978

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SOUTHEASTERN COMMUNITY COLLEGE,

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v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 933-5106

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472
(919) 642-7151

Counsel for Petitioner

May 4, 1979

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

This brief is filed pursuant to leave granted in open Court by the Chief Justice during the course of the oral argument in this case on Monday, April 23, 1979. This brief is limited to a response to the amicus brief submitted by the Solicitor General on behalf of the United States. Leave to file that tardy amicus brief was given by the Court on April 23, the day of the oral argument.

I.

THE SOLICITOR GENERAL'S BRIEF IGNORES THE ESTABLISHED CONGRESSIONAL POLICY RESPECTING NURSE TRAINING PROGRAMS.

At the heart of this case is the public interest in having the safest possible nursing care for those who are ill or injured. That concern for the safety and welfare of the sick is necessarily implicated by the petitioner's Associate Degree Nursing Program, which calls upon the nurse trainees to deal directly with hospitalized patients in a wide spectrum of clinical situations. And it was that concern, the concern that respondent's hearing impairment constituted a "potential danger to future patients," in clinical situations, that motivated the District Court's approval of the College's denial of admission.

The Solicitor General's brief ignores this overriding public concern. It thereby ignores the impact of this concern upon the interpretation and application of Section 504 with respect to a federally funded program of this clinical nature. At the same time, the Solicitor General's brief ignores the concern that Congress has consistently shown with respect to maintaining a high level of nurse training programs in order to provide the public with the safest possible nursing care by fully qualified nurses.

As discussed more fully in petitioner's reply brief herein, pp. 12-16, Congress has carefully erected a statutory policy with respect to federally funded nursing school programs, a policy that antedates Section 504 and that must be respected when dealing with Section 504.

Congress exhibited a concern that qualified persons be trained to meet the public needs for safe nursing care when it enacted the Nurse Training Act of 1964, 78 Stat. 912.

Whatever federal funding the petitioner's nursing program has received comes directly from that 1964 statute, which was designed to meet the public need for safe nursing by funding programs to train fully qualified nurses. Congress expressly promised that such grants would in no way be conditioned on changing the curriculum, personnel, methods of instruction or administration of any nurse training program. 42 U.S.C. § 298a. In other words, Congress recognized that federally funded nurse training programs – the very kind of programs that appear to fall within the scope of Section 504 – must maintain a high level of training of those who are physically qualified to provide safe nursing care. There is to be no compromise in programming to permit the training of the unqualified or the half-qualified.

At the same time, Congress has also recognized that the seriously handicapped should be allowed the opportunity to be trained for physically-demanding vocations and professions to the best of their physical abilities. To that end, the Education Amendments of 1974, 20 U.S.C. § 1424a, authorized a system of grants to develop such special programming for the handicapped. That is precisely the kind of programming that respondent seeks to have established under Section 504.

Section 504, when fitted into this overall statutory scheme, is obviously not a vehicle for accommodating and modifying nurse training programs to suit the needs of the physically handicapped. At least with respect to federally-funded nurse training programs, Section 504 was not meant to repeal or modify the Nurse Training Act commitment to maintain the most demanding levels of training necessary to provide safe nursing care. Nor was Section 504 deemed a substitute means of providing special nurse training programs for the

seriously handicapped. Such programs are available under the Education Amendments of 1974.

All of this confirms the propriety of reading Section 504 to mean precisely what it says. Its nondiscrimination duty reaches only the "qualified," handicapped individual. By no stretch of its language can Section 504 be viewed as an affirmative accommodation dictate with respect to handicapped persons who are physically unqualified to participate safely in a nurse training program.

II.

THE DEFINITION OF "OTHERWISE QUALIFIED" URGED BY THE SOLICITOR GENERAL AND HIS CONTENTION THAT A GENERAL AFFIRMATIVE ACTION OBLIGATION EXISTS FOR FEDERAL GRANT RECIPIENTS MUST BE REJECTED AS UNFOUNDED IN LIGHT OF THE LANGUAGE AND HISTORY OF SECTION 504.

Apparently rejecting the Fourth Circuit's clearly erroneous view of the meaning of Section 504, the Solicitor General has nevertheless retreated to a position with no sounder foundation. Rather than point to any language in Section 504 (or anything in its original history) justifying his interpretation of the words "otherwise qualified" the Solicitor General seems content to patch together disparate, after the fact and often out of context utterances from committee reports and debates. The end result is a broken-mirror image of the statute which distorts rather than reflects legislative intent.

The Solicitor General says that Section 504 does not require an educational institution receiving federal funds to gauge a handicapped applicant's qualifications either "without resort to" or "in spite of" his or her handicap. Rather,

he argues that Section 504 requires a recipient first to determine whether an applicant meets "admission standards unrelated to physical ability and then, if the decision is affirmative, to consider whether the program of instruction" can be modified "to permit the applicant to participate." U.S. Br. 29-30, 34, 38-39. This position rises or falls, however, on the presumed existence in Section 504 of a requirement for federal grant recipients to take affirmative action with respect to the handicapped. The bits-and-pieces approach adopted by the Solicitor General to determine legislative intent, of course, is not applicable where, as here, the statute's meaning is plain. But even were it to apply, it fails to justify his proposition.

For example, the Solicitor General repeatedly refers to language in Senate Report No. 93-1297 (93d Cong. 2d Sess. (1974)) on the Rehabilitation Act Amendments of 1974, *reprinted in* [1974] U.S. Code Cong. & Admin. News 6373, which he claims states that "Section 504 'is intended to include a requirement of affirmative action as well as a prohibition against discrimination.'" *Id.* at 33. The full quote from that report, not reproduced by the Solicitor General, is (emphasis added):

> *Where applicable,* section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination.

In the next few pages of the report it becomes clear that the phrase, "Where applicable," is a reference to State vocational rehabilitation plans submitted in connection with Title I of the Rehabilitation Act, *not to federal grant programs in general.* In fact, the 1974 amendments to the Act imposed a requirement on State agencies and every other facility in receipt of assistance under Title I of the Act to take affirmative action *to employ* certain qualified

individuals. 29 U.S.C. § 721(a)(6). In terms similar to the paragraph containing the Solicitor General's truncated quote, the Senate Committee said that:

> "[*T*]*hese* State agencies and facilities should be held to the same exemplary standard for affirmative action required of the Federal agencies with particular responsibilities for programs affecting handicapped individuals, in order to serve as a model for compliance with the affirmative action that is required of all Federal contractors and all Federal sub-contractors under section 503 of the Act." *Id.* at 6392 (emphasis added).

It is instructive to note that if Section 504 when enacted in 1973 was intended to impose an affirmative action requirement on federal fund beneficiaries there would have been no need for Congress in 1974 to require affirmative action by Title I beneficiaries.[1]

In addition, *nowhere* in the 1978 amendments to the Act or legislative committee reports is there any statement that all federal beneficiaries simply by the terms of Section 504 are required to modify programs in the name of affirmative action. Nor does the fact that Congress authorized spending and grants for awarding services such as interpreters for the deaf, *see, e.g.*, 29 U.S.C. § 775, imply anything of this sort. Congress could have intended the offers of such services to assist grant recipients in complying with their affirm-

[1] In a similar vein, Congress in 1973 reasonably could not have intended to impose an affirmative action requirement on federal fund beneficiaries via Section 504 and at the same time in Section 501 to direct HEW to "encourage" State agencies (without qualification) to develop affirmative action programs for hiring the handicapped. *See* 29 U.S.C. § 791(c).

ative action duty pursuant to Title I of the Rehabilitation Act, or to aid the volunteer efforts of fund beneficiaries. More likely, Congress was attempting to treat the symptoms of HEW affirmative action excess rather than face the politically difficult cure.

Finally, nowhere in the Solicitor General's brief is there any explanation offered for Congress' imposition of an express affirmative action obligation under Sections 501 and 503 and failure to do so under Section 504. Petitioner submits that this omission was hardly inadvertent and that Congress deliberately chose not to impose such duties on all federal fund beneficiaries under Section 504. Because Section 504 imposes no affirmative action duty, the Solicitor General's circular definition of "otherwise qualified" is untenable and must be rejected.

III.

SECTION 1983 DOES NOT PROVIDE A VEHICLE FOR THE VINDICATION OF ALLEGED VIOLATIONS OF SECTION 504

The Solicitor General, on behalf of the United States as amicus curiae, has summarily asserted that because petitioner is a public educational institution, there is a direct route, via 42 U.S.C. § 1983 (1970), to federal district court for redress of respondent's statutory as well as constitutional rights. U.S. Br. 68-69. Thus the Solicitor General states that it is unnecessary to decide whether Section 504 of the Rehabilitation Act of 1973 gives rise to a private right of action as the instant case may be brought under Section 1983 to enforce the provisions of Section 504. However, such a conclusionary statement, without further discussion, presents an ostrich-like posture and ignores a major contro-

versy of federal jurisdiction left unanswered by this Court: namely, whether "§ 1983 authorizes suits to vindicate rights under the 'laws' of the United States as well as under the Constitution . . ." *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1975).[2] The only case cited by the Solicitor General as authority, *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), does not support the proposition; it only eradicated the "personal-property rights" distinction in *constitutional* challenges to state welfare practices under Section 1343(3). 405 U.S. at 542. Yet, this question has been the focal point of scholarly discussion[3] and central to recent cases argued before this Court. *See Chapman v. Houston Welfare Rights Organization*, No. 77-719 (argued October 2, 1978); *Gonzalez v. Young*, No. 77-5324 (argued October 2, 1978).

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[2] As noted in petitioner's reply brief filed with this Court on April 20, 1979, it is unnecessary to address this jurisdictional question as respondent's Section 1983 claim has at all times been solely grounded on an alleged violation of the Fourteenth Amendment and not Section 504 of the Rehabilitation Act of 1973. Nor does this case fall within the "substantiality doctrine" of *Hagans v. Lavine* that Section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), allow a district court to adjudicate as a matter of pendent jurisdiction a statutory claim under the Civil Rights statutes when they are accompanied by a constitutional claim of sufficient substance. In such cases, it is unnecessary for the court to determine whether such a statutory claim in its own right is sufficient to support federal jurisdiction. *See* Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968).

[3] *See* Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 16-18 (1970); Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404 (1972).

Petitioner contends, for the reasons discussed below, that 42 U.S.C. § 1983[4] cannot be utilized as a bootstrap to imply a private right of action under Section 504 against a "person"[5] acting under color of any State law for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws, ..."

To begin with, Section 1983 does not come into play without a "right" which is secured by the Constituion and laws. On this point, petitioner has maintained throughout this action that the plain meaning of Section 504 as well as its legislative history negates any attempt to imply a private right of action under its provisions. There has already been ample discussion in the briefs submitted by both petioner and the thirty-two States as amici curiae that application of the *Cort v. Ash* (422 U.S. 66 (1975)) standards and the 1978 amendments to the Rehabilitation Act lead to the inevitable conclusion that no private right of action may be implied under Section 504. *See also, Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), *petition for certiorari pending*, No. 78-1454. It would be

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[4] In its entirety, the statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] Of course, as an agency of the State of North Carolina, petitioner Southeastern Community College is not a "person" under Section 1983. *See* Quern v. Jordan, No. 77-841, decided March 5, 1979. This fact provides another reason for dismissing the Solicitor General's Section 1983 argument in this case.

anomalous on one hand to conclude that no private right of action exists under Section 504 but on the other hand to allow such private actions when the recipient of federal funds acts under color of State law. There is absolutely no indication that Congress ever intended to distinguish between private and public recipients of federal financial assistance. Such an interpretation would make it unnecessary for Congress ever to provide explicitly for a private right of action in that one could always be implied against a public institution under any of the infinite number of federal laws. Thus, Section 1983 would render the *Cort v. Ash* test totally superfluous.

In any event, the rights under Section 504 are those that empower the federal government under its implementing regulations to step in and secure compliance with its nondiscrimination policy for recipients who have received federal grant funds. It has long been recognized by this Court that the United States has an implied authority to sue for vindication of its proprietary and contractual interests in grants that it has made. *United States v. San Francisco,* 310 U.S. 16, 29-30, (1940); *United States v. Bell Telephone Co.,* 128 U.S. 315, 356-73 (1888); *United States v. San Jacinto Tin Co.,* 125 U.S. 273, 279-85 (1888). Additionally, a recipient can bring an action in court to question ultra vires actions of HEW in enforcing the statute. *Mayor and City Council of Baltimore v. Mathews,* 562 F.2d 914 (4th Cir. 1977), *withdrawn on other grounds,* 571 F.2d 1273 (4th Cir. 1978).

Even if Section 504 conferred rights on otherwise qualified handicapped individuals who allege discrimination on the part of recipients of federal funds, it does not fall within the definition of an act of Congress providing for equal or civil rights which is a necessary prerequisite for jurisdiction under Section 1983. Because Section 1983 speaks to

rights, privileges, or immunities "secured by the Constitution and laws," it could be argued that it provides a cause of action to hear a case brought pursuant to *any* law which bestows an express or implied right. This line of reasoning is tenuous at best, however, as in and of itself Section 1983 is a substantive statute providing a cause of action but not conferring jurisdiction. Rather, entrance into a federal district court is gained through its jurisdictional counterpart, 28 U.S.C. § 1343(3),[6] which confers district court jurisdiction over any civil action "authorized by law . . . to redress the deprivation, under color of State law . . . of any right . . . secured by the Constitution . . . or by any *Act of Congress providing for equal rights* . . ." It is readily apparent that Section 1343(3) is narrower that the language of Section 1983 in that the latter speaks to rights ". . . secured by the Constitution and laws . . ." without the limitation that such laws provide for "equal rights." Based in part on this limiting language of Section 1343(3) it has been held that this subpart does not provide jurisdiction over claims that a State has violated the Social Security Act which is not an equal or civil rights statute. *See Gonzales v. Young,* 560 F.2d 160 (3d Cir. 1977); *Andrews v. Maher,* 525 F.2d 113 (2d Cir. 1975); *Aguayo v. Richardson,* 473 F.2d 1090, 1101 (2d Cir. 1973), *cert. denied sub*

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6 This statute states in relevant part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

nom. Aguayo v. Weinberger, 414 U.S. 1146 (1974); *Almenares v. Wyman,* 453 F.2d 1075, 1082 n.9 (2d Cir. 1971), *cert. denied,* 405 U.S. 944 (1972); *McCall v. Shapiro,* 416 F.2d 246 (2d Cir. 1969); *Rosado v. Wyman,* 414 F.2d 170, 177, 181 (2d Cir. 1969), *rev'd on other grounds,* 397 U.S. 397 (1970). *Accord, Randall v. Goldmark,* 495 F.2d 356, 359 (1st Cir. 1974), *cert. denied,* 419 U.S. 879 (1974); *contra, Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974).

Thus, the issue is basically the extent to which the language in Section 1343(3) limits the general and broad words of Section 1983. There is little in the way of judicial opinions to shed light on this problem. *See Holt v. Indiana Manufacturing Co.,* 176 U.S. 68 (1900), which states that the provisions of Sections 1983 and 1343(3) "refer to civil rights only and are inapplicable here." *Contra, Bomar v. Keyes,* 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947).

Both Sections 1983 and 1343(3) share a common origin in Section 1 of the Civil Rights Act of 1871[7] and these provisions were meant to be complementary and construed together. *Examining Board v. Flores de Otero,* 426 U.S. 572, 583 (1976); *Lynch v. Household Finance Corp.,* 405 U.S. at 543 n.7. Their meaning may be found by examining the language of their provisions, the purposes of Congress in their enactment, and the circumstances surrounding the use of their words. *Examining Board v. Flores de Otero,* 426 U.S. at 580.[8] It is the position of petitioner

[7] Ch. 22, § 1, 17 Stat. 13 (1871).

[8] The first section of the 1871 Act provided:

> [a]ny person who, under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person with the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States shall . . . be liable to the party injured in an action at law, suit in equity, or other proper proceeding to be prosecuted in the several district or circuit courts . . . under the provisions of the act of the ninth of April 1866 . . . .

that application of these factors leads to the conclusion that any rights secured under Sections 1983 and 1343(3) must be based directly on Section 1 of the Fourteenth Amendment or on that section *and* on legislation specifically implementing its guarantee of equal rights. *See* respondent's brief in *Gonzalez v. Young,* at 34. This position gains support from the Court's comments in *Monell v. Dept. of Soc. Serv. of the City of New York,* 436 U.S. 658, 681 (1978), that ". . . § 1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment." Further, in an earlier opinion, this Court observed, "It has been said that the purpose of the legislation [§1 of the Civil Rights Act of 1871] was to enforce the provisions of the Fourteenth . . . Amendment." *Flores de Otero,* 426 U.S. at 582. Also, at the time of its enactment, the 1871 Act was referred to as a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." *Monell,* 436 U.S. at 665; *Monroe v. Pape,* 365 U.S. 167, 171 (1961).

Thus, it is important that the source of Section 1 of the Fourteenth Amendment is the Civil Rights Act of 1866, of which Section 2 was the model for Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. *See Lynch v. Household Finance Corp.,* 405 U.S. 540, 543 at n.7.[9]

[9] In part, the enactment of the Fourteenth Amendment was prompted by a need to ensure the permanency of rights secured by the 1866 Act and to resolve lingering doubts as to its constitutional

In its original version, Section 1 of the 1871 Act contained both the substantive provision protecting against the deprivation of any rights "secured by the Constitution" as well as the jurisdictional provisions authorizing proceedings in both the district and circuit courts of the United States. However, in 1874 when Congress revised and codified the various civil rights acts, important changes were made affecting Section 1 of the 1871 Act. The recodification resulted in the statutes being divided into separate substantive and jurisdictional sections and what is today Section 1983 was then designated as Rev. Stat. § 1979 (1875). It was in this new provision that for the first time the phrase ". . . secured by the Constitution *and laws,*" was used (emphasis added).[10] Furthermore, although the jurisdictional grant to the district courts was basically identical to the substantive provision in Section 1979,[11] the jurisdictional grant to circuit courts limited its provisions to rights secured by the constitution or by any act of Congress *"providing for equal rights."* Rev. Stat. § 629(16) (1875). *Lynch v. Household Finance Corp.*, 405 U.S. at 543 n.7. These changes occurred without comment or any indication that they were intentional. Just as silently, in 1911 when the circuit courts' original jurisdiction was abolished by Congress, the "equal rights" language of the circuit court provision was retained with the enactment of what is today Section 1343(3) providing solely for district court jurisdiction. Act of Mar. 3, 1911, 36 Stat. 1087.

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authority. Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev 1323, 1329-1333 (1952).

[10] It has been suggested that this language was added to assure a remedy for the deprivation of those rights that came under the Civil Rights Acts of 1866 and 1870. Note, Federal Jurisdiction Over Challenges to State Welfare Systems, 72 Colum. L. Rev. at 1418.

[11] Rev. Stat. § 563(12) (1875).

Petitioner submits that this historic entanglement and almost symbiotic relationship of Sections 1983 and 1343(3) compel the reading of "rights . . . secured by the Constitution and laws" to mean rights that have their basis in the guarantees of Section 1 of the Fourteenth Amendment and in laws in conjunction with the Amendment that implement its guarantees. Only this interpretation supplies some rationale for the original choice and subsequent retention by Congress of the "equal rights" language of Section 1343(3). In addition, this construction avoids the dramatic expansion of federal jurisdiction that would be the consequence of allowing private rights of action to be brought against public officials and institutions under "any" of the infinite laws that presently make up the United States Code. As petitioner indicates in the discussion below, nothing in the words or history of Section 504 brings it within the confines of a law providing for equal rights within the meaning of Sections 1983 and 1343(3).

Nor is Section 504 an act "providing for the protection of civil rights," which would support jurisdiction under 28 U.S.C. § 1343(4). This provision grants original jurisdiction to the district courts over actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." One liberal but faulty theory of jurisdiction under Section 1343(4) is that Section 1983 is an "Act of Congress providing for the protection of civil rights," and therefore any cause of action that can be asserted under Section 1983 would immediately qualify for jurisdiction under Section 1343(4). *See Gonzalez v. Young*, 560 F.2d 160, 167-68 (3d Cir. 1977); *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). This "chicken and egg approach," as aptly described in *Gonzalez*, fails for several reasons. First, the language of the

two provisions are not the same in that Section 1343(4) is more restrictive than Section 1983. Second, Section 1983 "merely provides a procedure by which substantive rights secured by other statutes can be asserted," and does not in and of itself create or secure substantive rights. Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1427 (1972); *Gonzales v. Young*, 560 F.2d at 168. Consequently, as Section 504 is not an act "providing for the protection of civil rights"[12] there is no substantive right that provides a cause of action by which jurisdiction can be assumed under Section 1343(4).

Another objection to this theory is that the legislative history of Section 1343(4) indicates that this subsection was enacted to ensure jurisdiction for claims that were based upon the Civil Rights Act of 1957. *See*, H.R. Rep. No. 85-291, 85th Cong., 1st Sess., *reprinted in* [1957] U.S. Code Cong. & Admin. News 1966, 1976. Obviously, Section 504 is not based on that act. Despite this significant restriction placed on the subpart by the legislative history, this Court has allowed jurisdiction under Section 1343(4) in cases involving acts other than the Civil Rights Act of 1957. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1, (1968) (Civil Rights Act of 1866); *Allen v. Board of Education*, 393 U.S. 544, 554 (1969) (Voting Rights Act of 1965). However, as the Second Circuit observed in *Andrews v. Maher*, "there is a difference between extending Section 1343(4) to laws such as these, which protect specific rights and engender comparatively little litigation, and applying it to Section 1983, which protects all rights 'secured by the Constitution and laws,'" 525 F.2d at 120. Further, the court in *Randall v. Goldmark*, 495 F.2d 356, 360 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974), voiced this warning:

[12] See discussion *infra* at 17.

> "Although [Jones v. Mayer] might be taken as an endorsement of a broad reading of the statute, applying § 1343(4) to § 1983 would in essence eliminate the jurisdictional requirement for any federal question case involving deprivations under color of State law, a consequence arguably so broad when measured in the light of the congressional objectives in adding § 1343(4) that we prefer not to make a positive commitment at this time."

Of course, Section 504 is neither a statute providing for equal rights within the meaning of Section 1343(3) nor is it a civil rights statute within the meaning of Section 1343(4). As the Solicitor General has conceded, the statute "focuses primarily on the provision of federal financial assistance for vocational rehabilitation programs." U.S. Br. 25-26. It was patterned after and is almost identical to the antidiscrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, and Section 901 of the Education Amendments of 1972, 42 U.S.C. 1683. S. Rep. No. 93-1297, 93 Cong., 2d Sess. 39-40, *reprinted in* [1974] U.S. Code Cong. & Admin. News 6390. All three of these nondiscrimination statutes were enacted by Congress in the exercise of its spending power under Art. 1, § 8, clause 1 of the Constitution. This, too, has been noted by the Solicitor General (U.S. Br. in *Cannon v. University of Chicago*, No. 77-926, at 29): "the legislative authority invoked by Title VI is the power to spend federal funds. Congress can legitimately impose specific conditions on those who voluntarily receive federal financial assistance." There is sparse legislative history on Section 504 but in discussing the origins of Title VI, Representative Celler stated:

> "The enactment of Title VI is intended to provide . . . express statutory support for action

> being taken by the executive branch. As a matter of simple justice, federal funds, to which taxpayers regardless of race, color, or creed contribute, ought not to be expended to support or foster discriminatory practices." 110 Cong. Rec. 2466, 2468 (1964).

Also, Representative Rodino stated, "I believe this Title VI is an exercise of the undoubted power of Congress to fix the terms upon which federal funds will be spent." 110 Cong. Rec. 2466, 2468 (1964). Furthermore, Senator Humphrey, in pointing out several reasons for Title VI stated: "The purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination." 110 Cong. Rec. 6544.

The most illuminating statement as to its authority is contained in a legal memorandum dealing with the constitutionality and legality of Title VI inserted in the Congressional Record by Representative Celler, a sponsor of the legislation:[13]

> "Title VI is not an exercise of regulatory authority over activities within the States. Its application is confined to programs and activities which receive Federal financial assistance, by way of grant, loan, or contract and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available." 110 Cong. Rec. 1527.

In conclusion, the Solicitor General, by asserting Section 1983 affords a private right of action under Section 504

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[13] See the brief submitted by Yale University as amicus curiae in Cannon v. University of Chicago, No. 77-926, for an excellent discussion of the spending power as the authority for Title VI.

in cases that involve public recipients, would take the lid off Pandora's Box. For the reasons that have been discussed above, petitioner urges this Court to restrict jurisdiction under this statute to the appropriate equal and civil rights cases to which it was intended to apply. Section 504 clearly falls beyond this intended scope.[14]

CONCLUSION

The considerations advanced herein further justify reinstating the District Court's judgment.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chape Hill, N.C. 27514
(919) 933-5106

EDWARD L. WILLIAMSON
BENTON H. WALTON, III
136 Washington Street
Whiteville, N.C. 28472
(919) 642-7151

Counsel for Petitioner

May 4, 1979

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[14] As conceded by the Solicitor General:

> "Congress [in adopting Section 504] simply enacted a provision prohibiting discrimination against the handicapped in federally funded programs; it did not describe the kinds of practices it wished to ban or the way in which victims of illegal discrimination could obtain relief." (U.S. Br. at 31.)

MOTION FILED
MAR 23 1979

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Appellant

v.

FRANCES B. DAVIS,
Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA

JEFFREY H. ORLEANS
Special Assistant to the President

ELIZABETH C. BUNTING
Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

MOTION FOR LEAVE TO FILE AS AMICUS

The Board of Governors of the University of North Carolina respectfully requests permission to file as *amicus* in the above captioned case. Our interest in submitting this brief rests on the fact that Section 504 of the Rehabilitation Act of 1973, 29 USC 794, *particularly* as construed by the Court below, will have a substantial impact on the programs and policies of the sixteen constituent institutions which make up the University of North Carolina. Because we believe that the construction of this statute by the Department of Health, Education and Welfare and the Courts is not in keeping with the spirit, intent or even the plain language of the Act itself, we are deeply interested in an in-depth analysis of this statute by this Court. For these reasons, we would appreciate this opportunity to address those views we feel necessary for this analysis.

We file this motion and accompanying brief technically on behalf of respondent; however, as noted above, we do not

support either of the Courts below in this case. Instead, we would offer this different approach to the questions concerning handicap discrimination in the academic environment.

This the 23rd day of March, 1979.

Respectfully submitted,

JEFFREY H. ORLEANS
Special Assistant to the President
The University of North Carolina
Post Office Box 2688
Chapel Hill, North Carolina 27415

ELIZABETH C. BUNTING
Counsel

Counsel for the
BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA

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IN THE

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No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
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Appellee

BRIEF *AMICUS CURIAE*
OF THE BOARD OF GOVERNORS
OF THE UNIVERSITY OF NORTH CAROLINA

I. INTEREST OF AMICUS CURIAE

The University of North Carolina is a public university composed of the sixteen State-supported senior institutions of higher education in North Carolina and enrolling over one hundred thousand students. The Board of Governors is the "body politic and corporate" embodying The University, and is "responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions." N.C.G.S. 116-3, 116-11(2).

As recipients of federal financial assistance, The University's constituent institutions are subject to various federal civil rights statutes administered by the Department of Health, Education, and Welfare (hereinafter, "H.E.W."), and thus The University's resources and operations are affected significantly by the standards, procedures, and legal requirements developed by that Department and by the courts in interpreting and applying such legislation. One such provision that applies to The University and affords University students protection against discrimination is Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; H.E.W. has issued a regulation to implement Section 504 that applies to this University, 45 C.F.R. Part 84. *Amicus* believes that key provisions of this regulation are not in keeping with the spirit or purpose of Section 504, and that their application to The University therefore will have a direct and improper adverse impact on the students attending the public senior institutions of North Carolina. Additionally, should this Court remand the present litigation, any decision by the Court of Appeals for the Fourth Circuit would state the law of the Circuit in which this University is located. The Board's interest in the present litigation, therefore, is substantial.

Amicus does not support the opinion of either of the courts below in this case. The opinion of the district court was rendered prior to issuance of the H.E.W. regulation which is significantly at issue before this Court. The decision of the Fourth Circuit which endorsed application of that regulation is faulty both factually and legally. Both the opinions below and the H.E.W. regulation fail to provide handicapped students with appropriate opportunities for accommodation to their handicaps, and fail to provide institutions of higher education with appropriate opportunities for determining what accommodation should be made to handicaps.

II. HISTORY OF THE CASE

Section 504 of the Rehabilitation Act of 1963, 29 U.S.C. 794, provides that:

> no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

On June 3, 1977, the Department of Health, Education, and Welfare issued at 45 C.F.R. Part 84 a regulation that defines the responsibilities of educational institutions subject to Section 504, and that applies both to admission decisions and to subsequent treatment of students during matriculation.

Reliance on H.E.W.'s regulation forms the core of the court of appeals opinion in this case. That regulation, however, does not properly resolve the rights of either party to this case, because it seeks to apply Section 504 in ways that depart from settled and sound principles controlling implementation of federal civil rights legislation. In this litigation, therefore, this Court has the opportunity to direct a return to historically tested means of eliminating discrimination that will apply Section 504 far more effectively and correctly than will the H.E.W. regulation.

Ms. Davis' application for enrollment in Southeastern's registered nursing curriculum was rejected after Southeastern's Admissions Review Committee "determined by reason of her severe hearing impairment that she is not a qualified applicant for training as a Registered Nurse." *Davis* v. *Southeastern Community College,* 424 F. Supp. 1341 at 1342 (E.D.N.C. 1976). She brought suit alleging a violation of Section 504, and the district court held that she was not "otherwise qualified" for the nursing curriculum, and thus was not entitled to relief. The court found that:

> the single major factor in the defendant's refusal to allow admissions [sic] to plaintiff was her projected inability to be licensed as a Registered Nurse after

graduation. 424 F. Supp. 1341 at 1344.[1]

Plaintiff's application and rejection and the district court's consideration of her claim all occurred prior to issuance of the H.E.W. 504 regulation.

Plaintiff appealed to the Court of Appeals for the Fourth Circuit, which based its decision on the H.E.W. regulation that was issued six months following the district court opinion. While the Fourth Circuit panel "expressed[ed] no opinion concerning the scholastic suitability of the plaintiff to pursue her studies toward an RN degree," *Davis* v. *Southeastern Community College,* 574 F. 2d 1158 at 1160 (n. 5) (4th Cir. 1978), it held that:

> the district court erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program [citation omitted], rather than by focusing upon her academic and technical qualifications as required by 574 F. 2d at 1161.

The cited regulations provide, at 45 C.F.R. 84.3(k)(3), that:

> With respect to post-secondary and vocational education services [an otherwise qualified handicapped person is one] . . . who meets the academic and technical

[1] The record does not disclose whether plaintiffs' impairment in fact would have disqualified her for licensure under applicable North Carolina law. As did the court of appeals, *Amicus* "express[es] no opinion concerning the scholastic suitability of the plaintiff to pursue her studies toward an RN degree," 574 F. 2d at 1160 (n. 5), or "the question of 'limited' versus 'unlimited' certification of the plaintiff as an RN," *id.* at 1161 (n. 6).

> standards requisite to admission or participation in the recipient's education program or activity.

Holding that "precedent likewise supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive," 574 F. 2d at 1162, the court of appeals instructed the district court on remand "to give close attending," *ibid.*, to two particular Sections of the H.E.W. regulations in affording plaintiff relief:

> *45 C.F.R. 84.44(a). Academic requirements.*
> A recipient . . . shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. *** Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.
>
> *45 C.F.R. 84.44(d)(1). Auxiliary aids.*
> A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

The defendant's petition for *certiorari* posed two related questions that impliedly attacked the above-quoted portions of the regulation as going beyond the intent of the statute:

> (1) Does Section 504 of Rehabilitation Act preclude public college from basing denial of admission to college's Associate Degree Nursing Program solely upon admittedly severe hearing handicap of applicant,

where it is shown that handicap could interfere with applicant's ability to provide safe patient care both as student nurse and as potential Registered Nurse?

(2) Does Section 504 impliedly impose upon colleges affirmative obligation to provide preferential but modified educational opportunities for seriously handicapped who seek admission to highly skilled professional programs? 47 LW 3451 (January 8, 1979).

III. QUESTION PRESENTED

Does the construction of Section 504 by the Court of Appeals and the Department of Health, Education, and Welfare conflict with the true purpose of the Statute?

IV. SUMMARY OF ARGUMENT

Amicus believes the parts of the H.E.W. regulation on which the court of appeals relied embody two basic inadequacies that, if actually enforced, are more likely to harm handicapped students than to meaningfully assist them, and are likely to unnecessarily restrict institutions of higher education in their capacities to give genuinely practical and effective support to handicapped students. First, the regulation presumes that handicapping conditions are irrelevant to a potential student's admissibility to or success in an education program, and that students can—indeed, must—be considered for admission to education programs without regard to their capacities for success at any time other than at the initial stage of admission.[2] Both these presumptions are wrong as matters of fact. Second, the cited sections of the regulation in effect purport to impose on institutions absolute responsibility for offsetting the effects of handicaps after students are admitted. That ostensible

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[2] While 45 C.F.R. 84.3(k)(3) refers to meeting standards of "admission or *participation*", *supra* [emphasis added], it is clear from the context of the regulation that "participation" refers only to initial entry into a program and is used synonymously with "admission."

obligation is uncalled for as a matter of law. Further, the suggestion of such an obligation may well mislead handicapped students into believing that admission to an education program is tantamount to subsequent success within that program or in the occupation for which it prepares students. That result is rarely true for *any* student, and H.E.W. in fact declines to guarantee it for *handicapped* students in a section of the regulation not discussed by the court of appeals panel.

Thus the apparent protections afforded students by the opinion below are illusory, and the constraints imposed upon institutional judgment in accommodating handicapped students are unjustified. Both these fundamental errors may be rectified by simple changes in the regulation based on clear precedent derived from other areas of equal opportunity law.

V. THE STATUTORY CONTEXT

While the Fourth Circuit panel purported to "limit our holding and our interpretation of the above-quoted regulations to the facts of this particular case . . . [and not] to expand further upon the regulations, their reasonableness, or their scope," 574 F. 2d at 1161 (n. 7a), the panel did, in effect, approve the cited Sections of the H.E.W. 504 regulation as written. Thus this Court is asked to decide whether the absolutist provisions of the cited Sections of the regulation validly interpret and apply Section 504, both facially and in a wide variety of specific situations in institutions of higher education, or whether alternative standards are needed to properly implement the statute.

Section 504 was modeled formalistically after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 29 U.S.C. 1681 *et seq.*, and shares their purpose of preventing discrimination in, exclusion from, or denial of benefits under programs receiving federal financial assistance. Prohibiting discrimination based on handi-

cap, however, potentially raises issues quite different from those involved in prohibiting discrimination based on race or sex. The H.E.W. regulation fails to acknowledge those differences, while at the same time neglecting appropriate methods for attacking handicap discrimination against students that are consonant with the proven sound administration of analogous civil rights statutes.

Race and sex are both inherently suspect statutory classifications, deemed in law both by Congress and by this Court to be irrelevant to qualification for educational and employment opportunities. The scrutiny that should be given practices based on factors that *are* potentially material to such qualification, however, is unclear; review involving at least one such factor—age—is clearly to be less rigorous than where race or sex is at issue.[3] That there has been little address of what consideration properly may and should be given physical or mental handicap emphasizes the need for caution in seeking to employ Section 504; it has no useful legislative history, and less than a dozen reported judicial opinions purport to construe it within the context of higher education.[4]

In this context, the application of Section 504 should begin by recognizing the fundamental underlying difference between pur-

[3] Compare *Griggs* v. *Duke Power Co.*, 401 U.S. 421 at 436 (1971) and *City of Los Angeles Dept. of Water and Power* v. *Manhart*, U.S. at , 57 LED 2d 657 98 S. Ct. 1370 (1978), emphasizing the limited analytical role remaining when "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful" under Title VII of the Civil Rights Act of 1964, 98 S. Ct. at 376, with this Court's refusal to extend to age discrimination "suspect classification" status under the Equal Protection Clause in *Commonwealth of Massachusetts Board of Retirement* v. *Murgia*, 421 U.S. 974 (1976), and *Vance* v. *Bradley*, U.S. , 47 LW 4176 (1979).

[4] See, e.g., *Counts* v. *U.S. Postal Service*, holding that "[t]he appropriate standard of judicial review" under the Equal Protection Clause, of a Postal Service regulation barring persons with histories of epilepsy from certain kinds of jobs, "is not, as plaintiff contends, the 'strict scrutiny' test ordinarily applied where suspect classifications are involved." F. Supp. , 18 EPD Par. 8788 at p. 5253 (N.D. Fla. 1978).

porting to measure an individual's capacities based on his or her race or sex and purporting to do so in light of a demonstrably handicapping condition. The former attributes, virtually without exception, are irrelevant to one's abilities, in fact and therefore in law; that is why this Court validly could say about the job discrimination ban of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, that when "Congress . . . made [job] qualifications the controlling factor [in employment decisions] . . . , race, religion, nationality, and sex become irrelevant." *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 436 (1971). Both physical and mental handicaps may be inherently material to evaluating qualifications and capacities, however, so that "measur[ing] the person for the job and not the person in the abstract," *ibid.*, makes dispassionate address of the effects of handicap *essential* rather than extraneous.

Section 504 is predicated on this view, for it uses the Rehabilitation Act's statutory definition of a "handicapped person" as one who, *inter alia*,

> (i) has a physical or mental impairment which *substantially limits one or more major life activities.* 29 U.S.C. 706(b)(B); see also 45 C.F.R. 84.44(3)(h). [Emphasis added.]

It is thus apparent that, *by statutory mandate*, effective implementation of Section 504 requires acknowledgement that handicaps in fact may "substantially limit" personal abilities; the H.E.W. regulation precludes precisely that recognition. And cogent standards for measured and sensitive response to handicaps are particularly important in higher education, for this Court repeatedly has emphasized the need to assure that governmental scrutiny of colleges and universities is consistent with institutional diversity and autonomy.[5]

[5] See, e.g., *Board of Regents* v. *Roth*, 408 U.S. 564 and *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Board of Curators of the University of Missouri* v. *Horowitz.*, U.S. , 55 LED 2d 124 98 S. Ct. 948 (1978); and *Bakke* v. *Board of Regents of the University of California*, U.S. , 57 LED 2d 750 98 S. Ct. 2733 (1978) (opinion of Powell, J.).

As *Amicus* seeks to demonstrate below, however, the H.E.W. regulation endorsed by the court of appeals effectively denies the materiality of handicapping conditions throughout the educational experience. The sections of the regulation cited by the court of appeals refuse to recognize that handicaps *do* "substantially limit . . . major life activities," and that the Rehabilitation Act requires that those limits be remedied if possible, not ignored. The regulation thus departs from the statute in the fundamental sense that it requires institutions to *overlook* the possible effects of handicaps on students, while the statute requires institutions to *consider* those effects but to do so *nondiscriminatorily.* The regulation's central flaw is that it precludes just such an approach.

Judicial deference to regulations of federal agencies enforcing civil rights legislation should be informed by an appreciation of those regulations' actual inadequacies as well as of their intended beneficial impact; this Court has declined to follow federal civil rights guidelines where there is "persuasive indication" that they "sharply conflict with other indicia of the proper interpretation" of civil rights legislation. *General Electric Co.* v. *Gilbert,* 429 U.S. 125 at 143 (1976).[6] *Amicus* submits that, after careful analysis, this Court should decline to endorse the H.E.W. regulation as construed by the court of appeals because it does not properly protect appellee or otherwise properly interpret Section 504.

VI. ARGUMENT

Because the district court's ruling preceded issuance of the H.E.W. regulation, that court did not have the regulation available

[6] Compare *Lau* v. *Nichols,* 414 U.S. 563 (1974), sustaining application of an H.E.W. regulation under Title VI, with cases refusing to enforce sections of the H.E.W. regulation under Title IX: *Romeo Community Schools* v. *H.E.W.,* 438 F. Supp. 1021 (E.D. Mich. 1977), appeal docketed No. 6-71438 (6th Cir. May 18, 1977); *Seattle Univ.* v. *H.E.W.,* F. Supp. , 16 EPD Par. 8241 (W.D. Wash. 1978); *Brunswick School Bd.* v. *Califano,* 449 F. Supp. 866 (D. Me. 1978).

for its consideration. The subsequent opinion of the Fourth Circuit panel, however, does not so much address the holding below as endorse that regulation. Unless the regulation has a different meaning than is apparent, *Amicus* believes it mandates erroneous regulatory standards for defining the rights of handicapped applicants and students and for guiding and measuring institutional responses to their needs.

The regulation properly seeks to assure that the presence of a limiting handicap, in and of itself, does not automatically result in a denial of admission. As *Amicus* seeks to show, however, it adopts a view of the opposite extreme that overbroadly and mistakenly applies the statute. That is, the regulation concludes in effect that institutions of higher education must disregard the presence of any "substantial limits" to educational or professional capacity or achievement, caused by handicaps, in determining, first, whether applicants are qualified for admission to education programs and, thereafter, the extent of accommodation to handicaps that institutions should provide.

Because this approach is inconsistent with the realities both of the educational process and of authentic accommodation to handicaps within that process, it offers handicapped students a promise of success that may well not be susceptible of fulfillment. Indeed, a section of the regulation not discussed by the court of appeals significantly impinges on that promise. At the same time, the regulation places constraints on the exercise of educational judgment that have no relevance to the elimination of actual discrimination.

A. The regulation improperly precludes consideration of the effects of handicaps upon qualification for admission to education programs.

The sections of the H.E.W. regulation approved by the Fourth Circuit panel begin with the serious error of refusing to

acknowledge that a "handicap" potentially limits a student's ability to meet expectations about individual competence and performance that are valid parts of the educational process. That failure will not help a handicapped student meet the performance expectations he or she will encounter, or guide an institution in helping him or her to do so; students deserve realistic consideration of possible limits to their achievements as much as they do positive assistance in achieving as much as they potentially can.

Section 504's statutory basis for mandating a special response to handicaps is that they *do* constitute actual or potential "substantial limits" of a "major life activity," 29 U.S.C. 706(6)(B); 45 C.F.R. 84.3(j)(1). In this language the Rehabilitation Act *definitionally* acknowledges the potential relevance of a handicap to successful accomplishment in education, or any other field. At least as interpreted by the Fourth Circuit panel, however, the H.E.W. regulation conflicts directly with this premise, by decreeing that the presence of a handicap is irrelevant to *any* consideration of whether the "academic and technical standards" of admission are met, 574 F. 2d at 1161, *supra.*

Discrimination based on handicap often embodies inaccurate perceptions of the extent to which handicaps may impede successful use of educational opportunities, or of the effectiveness and expense of various efforts to overcome such impediments. Pretending that "limits" to "major life activities" do not exist, as do the regulation and the court of appeals, will not truly help those who are subject to those limits.

B. The regulation improperly separates consideration of initial admission to education programs from consideration of successful achievement during matriculation.

The regulation's error of misperceiving the potential effects of handicaps upon students is compounded by fundamentally misperceiving the nature and purpose of the student's educational

experience generally. Put simply, the model of education implicitly adopted by the regulation disregards the commonplace and basic expectations that students will develop and increase their capacities during matriculation, will successfully achieve a variety of educational objectives, and will successfully complete an education program. The regulation presumes instead that the educational experience consists of passively absorbing the content of some predetermined, static, and unvarying "program or activity"—with no expectation as to the student's participation save that he or she be initially "qualified" at the entry point. That is the clear result of the regulation's equating of "qualification" for participation *throughout* an education program, with meeting the standards for *"admission"* to it. 45 C.F.R. 84.3(k)(3), *supra.*

But in higher education, admissions decisions and standards are not seaparate from the rest of the educational process; they merely inaugurate it. They are useful only to the extent they anticipate, inform, or predict the student's success within that experience. The benefits potentially available to *any* student after admission largely reflect his or her own changing capacities to use the resources and opportunities a particular school or college presents. Pretending otherwise, as the regulation does by refusing to consider a student's likely experience after admission, provides apparent access to opportunities that the student foreseeably may not be able to use effectively. That is the hollowest kind of "nondiscrimination."

Indeed, a section of the regulation not cited by the court of appeals largely negates the admissions standard ostensibly embodied in Section 84.3(k)(3). At 45 C.F.R. 84.43(a), the regulation states that *after* admission:

> *Academic requirements that the [institution] can demonstrate are essential* to the program of institution being pursued . . . or to any directly related licensing requirement *will not be regarded as discriminatory.* [Emphasis added.]

This caveat presents the anomaly of an institution accepting an applicant—being *required* to accept an applicant—whom it knows cannot complete all essential elements of its program, and then being permitted to require of that student precisely those academic attainments it is known the student cannot accomplish.

The regulation thus substantially takes away the opportunity it purports to have conferred. That result, largely vitiating the protections apparently offered as to "admissions" alone, derives directly from the regulation's seeking to separate "admission" from all that follows it within the higher education experience.[7]

Higher education is not a *thing* but a *process;* the opportunities it offers are not simply the acquisition of "admission," but access to active participation in a myriad of subsequent activities, programs, people, and competencies. The student does not acquire these benefits simply by demonstrating initial eligibility at some single point in time, but by subsequently pursuing the opportunities thereby opened. The regulation offers no true protection to handicapped students by pretending otherwise.

Being a student is not, for example, equivalent to being a nonambulatory subway passenger, absolutely entitled to substantial accommodations to one's mobility impairments. See *Washington Urban League, Inc.* v. *Washington Metropolitan Area Transportation Authority, Inc.,* Civil Action no. 776-33 (D.D.C., September 1, 1976; unpublished memorandum and order). Students pursue federally financed educational experiences under expectations of active growth and accomplishment—of intelligence, dedication, and preparation upon enrollment, but then of continued achievement throughout matriculation. Though

[7] Instead, of course, institutions could choose to require as initial admissions criteria stricter standards, explicitly encompassing potential success at the end of a variety of particular courses of study. That result would simple increase barriers to admission for *all* students, rather than lowering them for handicapped persons.

of a subway passenger nothing more may be asked than the relatively passive virtue of civility, education is not a subway ride; the student is not a passenger.

C. The regulation fails to provide a clear and appropriate standard for accommodating the potential effects of handicaps upon educational achievement after admission.

This Court recently has emphasized the importance both of students' performance and of institutional autonomy in assessing that performance:

> University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation. *Board of Curators of the University of Missouri* v. *Horowitz.,* U.S. , 98 S. Ct. 948 (n. 6). (Powell, J., concurring).

These premises are not less apposite or susceptible of careful application when alleged discrimination is at issue than in the due process context before this Court in *Horowitz.* Yet the cumulative effect of H.E.W.'s regulatory perspective is virtually to preclude consideration either of a handicap's potential adverse effects on educational performance or achievement, or of the extent of realistic opportunities for overcoming such effects.

The regulation accomplishes this unwise result by adding to the requirement that admissions decisions be made "without regard to . . . disability," 475 F. 2d at 1160, the requirements for "academic adjustments" and "auxiliary aids" commended by the court of appeals and quoted above—that *after admission,* institutions *"shall," inter alia,* "make such modifications to [their] academic requirements as are necessary . . ." and "take such steps as are necessary to ensure" a lack of discrimination attributable to

"the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills." 44 C.F.R. 84.44(a),(d)(1), *supra.* In combination, these broad strictures suggest that institutions *must*—and, therefore *can*—ameliorate any constraints caused by a handicap throughout the educational experience.

The error in this approach is both simple and pervasive: It may not always be possible for the effects of handicaps to be accommodated to acceptable levels of educational performance, and it is the individual student who ultimately must cope with that result. That is the clear message of the regulation's "essential academic requirement" caveat that the court of appeals failed to consider, and it is echoed in the "Analysis" H.E.W. published to accompany the regulation, in addressing persons handicapped by reason of alcoholism or drug addition:

> It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. *The fact that drug addiction and alcoholism may be handicaps does not mean that those conditions must be ignored in determining whether an individual is qualified* for services or employment opportunities. *On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others* . . . . 42 *F.R.* 22682 (May 4, 1977). [Emphasis added.]

As written, the sections of the regulation relied on by the court of appeals appear to ignore this standard. At best, they artificially bifurcate consideration of a handicap's limits—first requiring that a student be admitted, thereby establishing expectations of success that may well be unfounded, and then permitting frustration of those expectations if "essential" academic requirements cannot be made. At worst, they disregard so thoroughly the potential limiting effects of any handicaps as to effectively equate

the operation of any performance ethic with discrimination. Nothing in the words or intent of Section 504 requires these results.

D. The regulation should adopt a standard of "reasonable accommodation" within the educational experience as a whole.

Amicus therefore believes that this Court should decline to enforce the H.E.W. 504 regulation, and should modify the judgments below, insofar as they purport to address a potential student's qualification for admission separately from his or her potential performance throughout the educational experience as a whole, and insofar as either would prohibit the taking into account of the extent and nature of possible accommodations to particular students' handicaps, on a case-by-case basis, in making admissions and other academic decisions. Such a judgment from this Court would assure handicapped students realistic and fair consideration of their applications and achievements, as intended by Section 504, in ways that the current H.E.W. regulation will not.

This position is neither novel nor unprecedented. Rather, models for precisely such an approach are contained in H.E.W.'s own regulation concerning employment subject to Section 504.

First, 45 C.F.R. 84.3(k)(1) defines a "qualified handicapped person . . . with respect to employment" as one "who, *with reasonable accommodation, can perform* the essential functions of the job in question." [Emphasis added.] Thus address of possible employment discrimination based on handicap explicitly encompasses the ability to accomplish varied and changing job functions, and the extent of assistance needed to secure that performance, rather than presumptively equating initial job-entry standards with successful employment. Substituting "can complete successfully the essential elements of the education program

in question," in the quoted section, for the phrase concern "functions of the job" would permit application of this "reasonable accommodation" standard to admissions decision in a way that would take appropriate account of an applicant's potential performance after admission.

Further, the concept of "reasonable accommodation" referenced in the employment definitions would permit consideration not only of a student's potential performance all through the educational experience, but also of the extent of accommodation that would be reasonable to facilitate such performance. Models for such analyses, realistically assessing both benefits and costs, are embodied in all federal civil rights legislation attacking job discrimination based on race, color, religion, sex, national origin, and age. Indeed, this Court defined the concept of "business necessity" as the "touchstone" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in *Griggs, supra,* 401 U.S. at 431. Examples of such "bona fide occupational qualifications" and standards of "reasonable accommodation," "undue hardship," and "business necessity" are set out in the margin.[8]

[8] Title VII of the Civil Rights Act, 42 U.S.C. 2000e, which prohibits employment discrimination based on race, color, religion, sex, or national origin, recognizes that legitimate expectations of employee performance may justify limited employment restrictions on these bases where:

(A) "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business," 42 U.S.C. 2000e(j). See *Hardison* v. *Trans World Airlines,* 432 U.S. 63 (1977) and *McDaniel* v. *Essex International, Inc.,* 571 F. 2d 338 (6th Cir. 1978).

(B) "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. 2000e-2(e), see *Dothard* v. *Rawlinson,* 433 U.S. *321* (1977) (maximum security prison may employ only male correctional officers in contact with male inmates); *Condit* v. *United Airlines, 558 F. 2d 1176 (4th Cir. 1977), affirming F. Supp. , 12 EPD Par. 11195 (E.D. Va. 1976)., cert. denied* U.S. , 98 S. Ct. 1510 (1978), *Harris* v. *Pan American World Airways,* F. Supp. , 15 EPD Par. 8015 (N.D. Cal. 1977), *In Re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F. 2d 1142 (7th Cir. 1978), *Burwell* v. *Eastern Airlines,* 458 F. Supp. 474 (E.D. Va. 1978) (Conditions under which elapsed time of pregnancy of flight attendants justifies suspension of duties without regard to actual individual health, stamina, or capacities).

These models have been fully adapted to federal and state provisions attacking employment discrimination based on handicap, including statutory "affirmative action" provisions applic-

(C) "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business . . . sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.,* 444 F. 2d 791 at 798 (footnotes omitted) (4th Cir. 1971), *cert. dism.* 404 U.S. 1006 (1971). See *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) and, e.g., *Spurlock* v. *United Airlines,* 475 F. 2d 216 (10th Cir. 1972) (Prior flying experience for airline pilot trainees sufficiently related to avoiding grave consequences of pilot failure, notwithstanding differential adverse impact on black applicants as a group).

Analogously, the Age Discrimination in Employment Act of 1976, 29 USC 621 *et seq.,* provides an exception to its prohibition upon employment actions taken "because of" an individual's age "where age is" a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(f)(1); Compare *Houghton* v. *McDonnell Douglas,* 553 F. 2d 561 (8th Cir. 1977), *cert. denied* U.S. , 98 S. Ct. 506 (1977) (Finding that age correlated with likelihood of any test pilot's possible incapacity was sufficient to overcome favorable evidence as to particular test pilot is clearly erroneous) with *Arritt* v. *Grissell,* 567 F. 2d 1267 (4th Cir. 1977) (No proof of inability to address possible performance inadequacies individually negates use of maximum permissible age at entry to service, particularly absent clear definition of actual adverse consequences feared).

able to federal contracts,[9] and the importance of performance standards, and the efficacy of measures of "reasonable accommodation" in implementing them, already are reflected in federal and state cases construing those provisions. Such cases clearly establish that handicapping conditions cannot *per se* disqualify applicants from jobs, but that conditions must be shown to be substantially likely to unacceptably impair particular applicants in performing particular duties.[10] The cases also make clear that a wide variety of factors can and should be considered in evaluating and resolving such potential problems,[11] that applicants properly

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[9] Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793, provides that federal contractors "shall take affirmative action to employ and advance in employment qualified handicapped individuals"; the Department of Labor regulations implementing Section 503 contain a "reasonable accommodation"/"undue hardship" provision similar to that of the HEW 504 regulation. 41 CFR 60-741.6(d).

[10] For cases decided under Section 504, see, e.g.: *Gurmankin* v. *Costanzo*, 556 F. 2d 184 (3rd Cir. 1977), affirming 411 F. Supp. 982 (E.D. Pa. 1976) (Blindness cannot *per se* disqualify prospective school teacher from city teacher's examination.); *Duran* v. *City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977), 451 F. Supp. 954, (M.D. Fla. 1978) (Past epilepsy cannot *per se* disqualify prospective police officer absent demonstration of present danger of unsuitability for job); *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (Municipality cannot absolutely exclude from employment former users of controlled drugs.)

[11] This Court granted *certiorari* last term in a case raising analogous issues under the Equal Protection cases. *Beazer* v. *New York City Transit Authority*, 558 F. 2d. 97 (2d. Cir. 1977), affirming 399 F. Supp. 1032 (S.D.N.Y. 1975), *cert. granted* U.S. , 98 S. Ct. 3121 (1978) (Past or present methadone usage cannot *per se* disqualify prospective transit employees for all jobs, but Transit Authority can make regulations "to ensure that past or present methadone users are proven to be employable and to prevent their employment in safety-sensitive jobs." 558 F. 2d at 99). Similarly, compare *Montgomery Ward* v. *Bureau of Labor*, 570 Pac. 2d 76 (Sup. Ct. Ore. 1977), with *Panettieri* v. *C.V. Hill Refrigeration*, A. 2d , 17 EPD Par. 8522 (Appel. Div. N.J. 1978) (Proof of likely adverse effect of past heart attack on performance in particular position requiring physical effort), and *Boynton Cab Co.* v. *Dept. of Industry, Labor, and Human Relations*, N.W. 2d , 18 EPD Par. 8819 (Wisc. Ct. of

need not be accommodated when the relevant proof is shown, and that such proof should address actual on-the-job capabilities, not simply the ability to meet initial standards of employment.[12] Finally, the section of the H.E.W. 504 regulation concerning "reasonable accommodation" in the context of employment illustrates the types of factors that would apply, by analogy, to

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Appeals 1978) with *N.Y. State Div. of Human Rights* v. *Averill Park Central Schl. Dist.*, 59 AD 2d 449 (Appel. Div. N.Y. 1977) (Past driving record refutes belief that person with one arm will not be safe taxi driver, applicant with corrected hearing impairment may be excluded from that position without inquiry into actual sufficiency of hearing.) See also *Fraser Shipyards* v. *Dept. of Industry, Labor, and Human Relations*, 13 EPD Par. 11515 (Cir. Ct. Wisc. 1976) (Notwithstanding demonstration that individual diabetics may be unqualified to fill positions as shipyard welders due to likelihood of disability-related conditions, sufficient such demonstration not made to disqualify particular applicant.)

[12] See, e.g., *Westinghouse Electric Corp.* v. *State Division of Human Rights*, 63 AD 2d 170, 18 EPD Par. 8868 (Appel. Div. N.Y. 1978): "The [State Human Rights Appeal] board's determination is apparently based upon the fact that the complainant at the time of his physical examination was not prevented by the condition found (dermatitis) from exercising his normal body functions and there is little question but that complainant, initially at least, could have physically performed activities involved. However, the record establishes by clear, convincing and uncontradicted medical evidence that the complainant was suffering from dermatitis which would be exacerbated by direct or indirect exposure to the chemicals known to be present in the Westinghouse plant . . . [and which therefore would] ultimately render the complainant incapable of satisfactorily performing the physical requirements of the job . . . . Thus, it seems obvious that the disability was related to complainant's "ability to engage in the activities involved in the job." *To hold, as the board apparently does, that the mere fact that the complainant could physically perform the job duties at the time of his physical examination means that the disability is unrelated to his ability to engage in the activities involved is contrary to the clear intent of the statute and the law of reason.*" 18 EPD Par. 8868 at p. 5596. [Emphasis added.]

evaluations of the effect of handicap upon admissibility to education programs and achievement within them.[13]

The regulation's failure to apply the perspective of "reasonable accommodation" stems directly from its failure to understand the role of continued achievement throughout the higher education experience, and from its refusal to acknowledge the possible adverse effects of handicap upon such achievements. By effectively ignoring handicaps, rather than requiring their meaningful analysis and accommodation, the H.E.W. regulation severely disserves handicapped students: It falsely suggests that they are exempt from the standards of performance that in many ways make higher education the valuable opportunity Section 504 seeks to perserve unto them.

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[13] 45 C.F.R. 84.12:

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include: (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant. 45 CFR 84.12.

The true intention of Section 504 is to eliminate *remediable* barriers to achievement in higher education, while acknowledging that there may be narrow but highly relevant inherent limits on the capabilities of handicapped students—as there are limits on those of all students generally. A clear understanding of this goal, and of the educational process to which it applies, should have led H.E.W. to adopt a "reasonable accommodation" standard for ameliorating the effects of handicap, analogous to standards recognizing the need for satisfactory individual performance in equal employment laws generally and in those relating to handicap specifically.

VII. CONCLUSION

Because Section 504 was enacted to prohibit exclusion from education programs on the basis of handicap alone, its purpose was to make valid measures of actual performance in such programs the touchstone of accommodating handicapped students. The sections of the regulation at issue here effectively forbid consideration of individual achievement and performance, and of possible limits thereon, in assessing proper accommodations to handicapped students. The promise of greater opportunity they hold out is thus an illusory one.

Instead, there is clear need for careful case-by-case review of the effect of a particular person's handicap on potential educational achievement, of the costs of ameliorating that handicap, and of the proper affirmative institutional response to each individual student on that basis. That focus on individual performance is precisely what equal opportunity law now requires of employers and educators in all analogous contexts, and it is consistent with the educational autonomy this Court has sought to protect when scrutinizing institutions of higher education.

Moreover, only individual attention to handicapped students and employees can properly provide them real opportunity. Handicapping conditions are not identical, and thus they are not susceptible of standardized or uniform amelioration by operation of broadly drawn rules; they have various and differentiated effects that require careful, individualized responses. The approach

recommended by *Amicus* in the application of Section 504 would emphasize the duty of educational institutions to make genuine, realistic provision for individual needs insofar as reasonably practicable.

Far from correctly applying Section 504, then, the H.E.W. regulation relied on by the court of appeals presents "persuasive indication" of "sharp . . . conflict that other indicia of the proper interpretation" of that statute. *General Electric Co.* v. *Gilbert,* 429 U.S. 125 at 143 (1976). Neither institutions of higher education nor their students should be subject to regulatory standards that misapprehend Congressional intent and that adopt positions inconsistent with the proper accomplishment of Section 504's objectives, particularly where the appropriate standard of judicial review of practices based on handicap is not yet certain.[14] Accordingly, *Amicus* urges this Court to enjoin enforcement of H.E.W.'s regulation insofar as it is written or interpreted inconsistently with principles discussed above, and to remand this mater for institutional action on plaintiff's application in light of her qualifications, her handicap, and the possibility of reasonably accommodating her handicap to successful performance in the education program to which she sought admission.

Respectfully submitted,

JEFFREY H. ORLEANS
Special Assistant to the President
The University of North Carolina
Post Office Box 2688
Chapel Hill, North Carolina 27514

ELIZABETH C. BUNTING
Counsel

Counsel for the
BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA

[14] See Text accompanying notes 3 and 4, *supra.*

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing BRIEF AMICUS CURIAE OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA to be deposited in the United States mail, postage prepaid, and adddressed as follows:

Phillip A. Diehl
William L. Pate
Attorneys at Law
Post Office Drawer 688
Raeford, North Carolina 28376

Marc P. Charmatz
Sy DuBow
National Center for Law and the
Deaf Legal Defense Fund
7th and Florida Avenues, N.E.
Washington, D.C. 20002

Stephen H. Sachs
Attorney General
State of Maryland
1 South Calvert Street
Baltimore, Maryland 21202

This the 23rd day of March, 1979.

by: _____

ELIZABETH C. BUNTING